EXEMPTION OF FUTURE INCOME PLANS

Final Report No. 91

May 2004

ALBERTA LAW REFORM INSTITUTE

EDMONTON, ALBERTA

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ISSN 0317-1604
ISBN 1-896078-27-3

ALBERTA LAW REFORM INSTITUTE

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ACKNOWLEDGMENTS

This report deals with an increasingly important area – the increasing reliance on RRSPs and similar vehicles to supplement or substitute for conventional pension plans. The growing incidence of the use of these media in turn highlights the uncertain and inconsistent state of the law relating to their exigibility and transfer. In particular, it is hard to justify a policy which appears to be based purely on the status of the issuer of the future income plan. We were fortunate to be able to obtain the services of Professor C.R.B. Dunlop to pilot this project through the research and consultation phase. While the starting point was the work done by the Uniform Law Conference, several factors, including the Senate Task Force on Insolvency, intervened to make the task more complex and more time consuming. We acknowledge with thanks Professor Dunlop's stewardship of this project and his clarity of analysis of the issues for Board review.

Professor Dunlop was assisted in some of the research by Alberta Law Reform Institute Counsel Cynthia L. Martens and had the benefit of advice from Project Committees, consisting of:

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Part way through the project we determined to add an additional subject area relating the treatment of future income plans in estate situations. For that subject we turned to Former Counsel Janice Henderson-Lypkie who has had carriage of the companion report on Exemption of Future Income Plans on Death. We thank them for coordinating the work on the two reports and the draft legislation.

We would also like to acknowledge the very helpful comments we received from a variety of sources. They are set out in Appendix A.

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PART I — EXECUTIVE SUMMARY

A. Purpose and Scope of the Report

The purpose of this report is to consider whether registered retirement savings plans (RRSPs), deferred profit-sharing plans (DPSPs), and registered retirement income funds (RRIFs) should be wholly or partly exempt from creditors' remedies. The report will also consider the exempt status of locked-in retirement accounts (LIRAs), life income funds (LIFs), and locked-in retirement income funds (LRIFs).

Alberta law generally does not permit creditors to enforce their claims or judgments against pensions, or against annuities and RRSPs issued by insurance companies. Pension statutes contain sections which protect pensions from enforcement. The *Insurance Act* does the same job for insurance products, including most annuities and RRSPs. However, Alberta law does permit a creditor to enforce a money claim or judgment against the non-insurance RRSP of the debtor. There is an unfairness in this exposure of non-insurance RRSPs, compared to the virtually complete protection of insurance RRSPs and annuities, and most pensions.

When pensions, insurance annuities, and RRSPs or RRIFs start to make payments to the depositor, the creditor's appropriate remedy is to attach the money obligation. Exemptions are again an issue. Most pension and insurance statutes expressly prohibit garnishment of benefits or money obligations. However, obligations to pay out of a non-insurance RRSP or RRIF (after tax is deducted) will be fully garnishable. Again, creditors' remedies law treats differently obligations which appear to be similar.

During the summer of 2001, the Alberta Law Reform Institute (the Institute) conducted a feasibility study to consider whether it should conduct a project on the exemption of RRSPs, DPSPs and RRIFs. The Institute Board decided in September, 2001, to undertake the Future Income Plans project, and, in June, 2002, published *Creditor Access to Future Income Plans: Consultation Memorandum*

No. 11. The Institute received several responses to the consultation memorandum which have been very helpful in the writing of this report.

B. Saving for Retirement

It is obvious that people who retire from their work need resources to survive, although recent studies make it clear that many Canadians have not saved enough to provide an adequate income during retirement. In the future, people will need to take more responsibility for saving for their retirement. People live longer, while government pensions, medicare and other benefits for the retired are tending to lag behind inflation. The trend since 1990 has been towards fewer pensionable jobs as a percent of the total available. It may be unrealistic for people to assume that they will be able to supplement their savings by working after retirement.

With the decline in pensionable employment, RRSPs have become an enormously popular way for people to save for retirement. However, the majority of cases have concluded that RRSPs and similar plans are exigible, and that obligations to pay money from such plans are garnishable. Future income plans provided by insurance companies are exempt from creditors of the depositor where the plans fit within the limited *Insurance Act* exemption sections. No such protection exists for non-insurance products in Alberta. Other provinces have adopted varying degrees of exemption protection for insurance and non-insurance future income plans.

C. RRSPs, DPSPs AND RRIFs Should be Totally Exempt

In our view, insurance and non-insurance RRSPs, DPSPs and RRIFs as defined in the *Income Tax Act*, and obligations to pay money out of such plans, should be totally exempt from all prejudgment and postjudgment creditors' remedies. The exemption will not apply to non-money claims or judgments based on property rights or on the enforcement of security taken on the future income plan, assuming such a security to be permitted by law. No distinction should be drawn among remedies nor should the exemption be different between insurance and non-insurance products. Put simply, these assets, like pensions, are so similar and so essential to the survival of individuals that they should be completely protected from creditors. The arguments for this conclusion can be summarized as follows:

(1) The present patchwork of exemptions for pensions, insurance and non-insurance retirement income plans is incoherent and unjust.

(2) Canadian law recognizes saving for retirement as a value worthy of protection and encouragement.

(3) Pensions and insurance RRSPs are totally exempt, and we have noted little call for diluting these exemptions. Pensions, insurance and non-insurance retirement income plans all serve the same purpose, saving for retirement, as evidenced by their common tax treatment. RRSPs, DPSPs and RRIFs are pension-substitutes and should enjoy the same exemption in creditor-debtor law.

(4) People save for retirement in various ways, but the *Income Tax Act* has singled out pensions, RRSPS, DPSPs and RRIFS as entitled to similar forms of tax exemption.

(5) Pensions, RRSPs, DPSPs and RRIFs may not be necessary while the debtor is working, but will be crucial to his or her survival during the years of retirement (and unemployment). Obligations to pay out of such plans are usually attached during retirement years when people are in a poor position to earn more money by working overtime, working a second job, or finding a better job. Retirement is when the income is needed and cannot be replaced or supplemented. Any enforcement process that renders retirees destitute simply ensures that they will become the responsibility of the state.

(6) A substantial amount of capital is necessary to fund even a modest pension or retirement income.

(7) Many, perhaps most, debtors either have no RRSP or have long since cashed it in before their financial affairs collapse completely. The practical impact of a total exemption will be minimal in most situations.

(8) To some extent, creditors can protect themselves by exercising care in extending credit or delaying collection proceedings.

(9) RRSPs are often held by the self-employed and entrepreneurs. Their exemption encourages entrepreneurs to continue an economically beneficial activity which may entail risks unrelated to any wrongdoing on the part of the entrepreneur.

We do not propose that the exemption be limited to locked-in plans. RRSPs are intended, among other things, to provide a source of retirement income, whether the plan is locked in or not. The *Income Tax Act* does not limit the RRSP program to locked-in plans. Such plans are de facto locked in for two reasons: (1) funds and property withdrawn from a plan will be taxable, and (2) our proposed exemption applies to property in a plan and does not apply to property once withdrawn. This double hit, plus the desire to continue retirement savings, will give depositors a strong incentive to leave future income plans alone. Ultimately, we see the goals of pensions and future income plans, whether locked in or not, as the same. They are intended and largely used for retirement saving. They all fall within our desired policy which is to protect such retirement nest-eggs from enforcement proceedings by creditors.

We would not limit the proposed exemption of future income plans by a dollar cap. Our basic policy is that tax-protected vehicles for retirement saving including pensions and RRSPs should be exempt. Pensions and insurance RRSPs are exempt now without any dollar limit except the de facto ceiling imposed by the *Income Tax Act*. We doubt that overcontribution as a debt avoidance device is likely to occur as it results in heavy and continuing tax penalties.

The Uniform Law Conference of Canada (ULCC), in its 1998 report, proposed as one limitation on abuse that the exemptions from enforcement and garnishment should cease to exist if the plan ceases to be an RRSP, DPSP or RRIF for the purposes of the *Income Tax Act*. In our view, this limitation on the exemption fits with our goal to exempt retirement savings plans registered as such under the *Income Tax Act*. If a particular retirement savings agreement is not a plan for the purposes of the *Income Tax Act*, it is not for our purposes either.

D. Same Exemption for Insurance and Non-Insurance Plans

From the beginning of this project to now, the overwhelming consensus among consultants has been that RRSPs, DPSPs and RRIFs offered by insurance and non-insurance providers are so similar that a disparity in exemptions is unfair and unreasonable, especially when compared to the exempt status of most pensions. Assets without any relevant difference should be subject to the same exemption.

In our view, the proposed exemption should be added to the *Civil Enforcement Act* and should apply notwithstanding s. 580(2) of the *Insurance Act*. The proposed exemption will override the *Insurance Act* exemption section only as to RRSPs, DPSPs and RRIFs and only as to exemptions. Section 580(2) of the *Insurance Act* remains in force and unmodified as to all other insurance products, such as annuities. We do not favour the creation of two similar or identical exemption provisions, one in the *Insurance Act* and the second in the *Civil Enforcement Act*. The danger is that, over time, the sections will drift away from each other, leading to the present situation of one rule for insurance products, and a different rule for the rest. This possibility would defeat our goal to create one exemption for all RRSPs, DPSPs and RRIFs.

The new exemption provision in the *Civil Enforcement Act* will not include some of the limitations in s. 580(2) of the *Insurance Act*. Because the new provision applies to insurance and non-insurance products, it should not include specific references to insurance or the requirement that the plan include an undertaking to provide an annuity. These limitations will continue in the exemption sections of the *Insurance Act* as to insurance products other than RRSPs, DPSPs and RRIFs.

Section 580(2) of the *Insurance Act* is limited to plans which designate a beneficiary who is "a spouse or adult interdependent partner, child, grandchild or parent, or any of them." This provision makes sense in an insurance statute where beneficiaries are essential. The Institute is told that the overwhelming majority of insurance and non-insurance RRSPs, DPSPs and RRIFs designate beneficiaries, and it is probably prudent to do so. But is there any need for creditor-debtor law to require a beneficiary for an exemption to exist? We think that the answer is no. The policy underlying our exemption proposals is that, while the debtor is alive, his or her savings for retirement should be protected. Whether or not the plan names a beneficiary is irrelevant to this goal, although it may be vital to proper financial and estate planning. The requirement to name a beneficiary is a trap for the unwary and should be omitted.

E. Same Exemption for LIRAs, LIFs and LRIFs

When an employee in a pensionable job terminates the employment before the normal retirement date, he or she has choices about the money in the pension plan. The employee may (1) leave the money in the plan, (2) transfer it to the new employer's pension plan (depending on the terms of the two plans), (3) purchase an annuity from an insurance company, or (4) buy a locked-in retirement account (LIRA). Assuming that the employee makes the most popular choice and purchases a LIRA, the employee may, at a date usually prescribed by the original pension plan, move the money from the LIRA into a life income fund (LIF) or a locked-in retirement income fund (LRIF), both of which permit withdrawals of money. Most commentators regard LIRAs as RRSPs, and LIFs and LRIFs as types of RRIF. If this were the whole story, the Institute report could propose that RRSPs be defined to include LIRAs, and RRIFs be defined to include LIFs and LRIFs. The locked-in plans are close enough to the usual RRSP or RRIF to merit the same treatment in judgment enforcement law.

The matter is complicated, however, by pensions legislation which regulates LIRAs, LIFs and LRIFs. Alberta pension statutes contain exemption sections which may apply to such plans. As we reviewed Alberta pensions legislation, we became struck by the incomplete, uncertain and inadequate nature of exemptions in the Alberta statutes, especially as to money payable from such plans. We therefore propose that the exemption of LIRAs, LIFs and LRIFs should be included in the Institute's general proposals for amendments to the *Civil Enforcement Act*. That is, (1) the term RRSP in the *Civil Enforcement Act* should be defined to include LIRAs; (2) the term RRIF in the same Act be defined to include LIFs and LRIFs; and (3) the section in the *Civil Enforcement Act* exempting RRSPs, DPSPs and RRIFs should expressly apply notwithstanding the *Public Sector Pension Plans Act*, the *Teachers' Pension Plans Act* and s. 85 of the *Employment Pension Plans Act*. The effect of our proposals is to override the exemption sections of Alberta pensions statutes and regulations only as to the exemption of LIRAs, LIFs and LRIFs.

F. Coming into Effect: Transition

The new exemption legislation should not be delayed artificially after passage but should come into force upon Royal assent. The creation of an exemption for non-exempt RRSPs, DPSPs and RRIFs corrects an injustice in the present law which should not continue longer than necessary. The normal legislative process has built-in delays which will give critics of the proposal ample time to make representations to the government, if they have not already commented on this report. The new exemption provision should apply to all debt, old or new, and should come into force on assent.

We propose one limit to the above proposal. Creditors may have sued their debtors and commenced enforcement processes against RRSPs, DPSPs and RRIFs. It is unfair to such creditors to have the rules changed half way through. This is retroactive legislation which is rejected by most governments, including Alberta. We therefore propose that the new exemption should not apply to an enforcement process commenced against an RRSP, DPSP or RRIF before this provision comes into force.

G. Transfers From One Registered Plan to Another

Owners of registered plans often transfer funds or property from one future income plan to another. If money or property is withdrawn from a plan, it is likely not exempt until it is safely deposited to the second plan. A depositor may effect a transfer of funds or property in at least two ways. The depositor may direct the first plan to transfer the funds or property directly to the second plan without the depositor receiving anything. Secondly, the depositor may close the first plan, receive the funds or property, and later open a second plan and deposit the funds or property into the new plan. Most depositors transfer money or property directly from one plan to another because no tax is assessed on such a transfer. If the depositor follows the second course and collapses the first plan, then tax will be withheld. One consultant told us that 99.9% of people transferring from one RRSP to another will do so directly.

In our view, the new exemption should extend to direct payments or direct transfers of funds or property from one registered future income plan to another as

permitted by the *Income Tax Act*. The intention is clearly not to transfer property to the debtor but to continue the retirement saving scheme, albeit with a new depository. The *Income Tax Act* singles out this kind of direct transfer as being tax-free. It is difficult to see how the direct transfer of property or funds between registered plans can result in a dishonest advantage to the debtor, as the property will not be in the debtor's hands.

On the other hand, we do not believe that there should be any extension of the exemption where the depositor withdraws money from a registered plan and holds it with perhaps an intention of depositing the money into a new plan. The difference is that the debtor now has the plan funds or property in his or her possession, and is free to use them for any purpose. If the intention behind our exemption proposal is to protect retirement savings, then that exemption cannot extend to funds or property which the debtor is free to use for any purpose.

PART II — LIST OF RECOMMENDATIONS

RECOMMENDATION No. 1
RRSPs, DPSPs and RRIFs, and obligations to pay money from such plans, should be completely exempt from all writ proceedings as defined in the *Civil Enforcement Act*, attachment orders under Part 3 of the *Civil Enforcement Act* and any other prejudgment and postjudgment remedies under any other enactment or law that may result in a money judgment. The exemption will not extend to non-money claims or judgments based on property rights or on the enforcement of security taken on the future income plans. 68

RECOMMENDATION No. 2
The terms RRSP, DPSP and RRIF should be defined by reference to their definitions in the *Income Tax Act*. 69

RECOMMENDATION No. 3
The exemption in recommendation 1 should cease to exist if the RRSP, DPSP or RRIF ceases to be an RRSP, DPSP or RRIF for the purposes of the *Income Tax Act*. 71

RECOMMENDATION No. 4
RRSPs, DPSPs and RRIFs should be subject to the same exemption, whether the plans are sold by insurance or non-insurance vendors. 73

RECOMMENDATION No. 5
The new section exempting RRSPs, DPSPs and RRIFs should be part of the *Civil Enforcement Act* and should apply notwithstanding s. 580(2) of the *Insurance Act*. 77

RECOMMENDATION No. 6
The new *Civil Enforcement Act* section exempting RRSPs, DPSPs and RRIFs
(a) should exempt an RRSP, DPSP or RRIF, whether or not it contains an undertaking to provide an annuity;
(b) should eliminate specific references to insurance; and
(c) should exempt an RRSP, DPSP or RRIF, whether or not it names a beneficiary. 79

RECOMMENDATION No. 7
(1) The term RRSP in our proposed exemption should be defined to include locked-in retirement accounts (LIRAs).
(2) The term RRIF in our proposed exemption should be defined to include life income funds (LIFs) and locked-in retirement income funds (LRIFs).

(3) The new section exempting RRSPs, DPSPs and RRIFs should apply notwithstanding the *Public Sector Pension Plans Act*, the *Teachers' Pension Plans Act* and section 85 of the *Employment Pension Plans Act*. 82

RECOMMENDATION No. 8

(1) The new exemption provision should come into force upon Royal assent.
(2) The new exemption provision should not apply to an enforcement process commenced against an RRSP, DPSP or RRIF before the date of Royal assent. . 84

RECOMMENDATION No. 9

The new exemption provision should extend to direct payments or direct transfers of funds or property from one future income plan to another as permitted by the *Income Tax Act*. 87

PART III — REPORT

CHAPTER 1. PURPOSE AND SCOPE

A. Introduction

[1] The purpose of this report is to consider whether registered retirement savings plans, deferred profit-sharing plans, and registered retirement income funds should be wholly or partly exempt from creditors' remedies.[1] The report will also consider in c. 4 the exempt status of locked-in retirement accounts (LIRAs), life income funds (LIFs), and locked-in retirement income funds (LRIFs). These issues are significant because of the policy questions involved and the large sums of money at stake. Sellers of RRSPs and similar products stand to win or lose market share, in part because of changes in the exemptions rules. The issue is also significant because of the arbitrary and unjust disparities in the present exemptions.

[2] Alberta law generally does not permit creditors to enforce their claims or judgments against pensions, or against annuities and RRSPs issued by insurance companies. Pension statutes contain sections which protect pensions from enforcement. The *Insurance Act*[2] does the same job for insurance products, including most annuities and RRSPs.

[3] However, Alberta law does permit a creditor to enforce a money claim or judgment against the non-insurance RRSP of the debtor. A civil enforcement agency, acting for a judgment creditor, can serve an enforcement order on the depository managing the plan. The likely effect of service of the order is to compel the depository to collapse the plan and pay the balance after tax to the agency for distribution to the enforcing creditor and any other creditors entitled to share in the

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[1] This report uses abbreviations to identify registered retirement savings plans (RRSPs), deferred profit-sharing plans (DPSPs) and registered retirement income funds (RRIFs).

[2] R.S.A. 2000, c. I-3.

proceeds of enforcement.[3] There is an unfairness in this exposure of non-insurance RRSPs, compared to the virtually complete protection of insurance RRSPs and annuities, and most pensions.

[4] When pensions, insurance annuities, and RRSPs or RRIFs start to make payments to the depositor,[4] the creditor's appropriate remedy is to attach the money obligation. Exemptions are again an issue. Most pension and insurance statutes expressly prohibit garnishment of benefits or money obligations. However, obligations to pay out of a non-insurance RRSP or RRIF (after tax is deducted) will be fully garnishable. Again, creditors' remedies law treats differently obligations which appear to be similar.

[5] The inconsistency in treatment of RRSPs and similar plans has been the subject of other law reform activities. In 1998 and 1999, the Uniform Law Conference of Canada (ULCC) approved a consultation report and a uniform bill which sought to correct what the Conference saw as an unfairness in the exposure of RRSPs to enforcement and garnishment.[5] An extract from the *ULCC Uniform Bill* is attached as Appendix B to this report. The principal recommendations in the *ULCC Consultation Report* can be summarized as follows:

(1) All rights, property and interest of a depositor in RRSPs, DPSPs and RRIFs should be exempt from any enforcement process. The effect of this proposal is that such assets would not be available to creditors enforcing their claims or judgments or to trustees in bankruptcy.

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[3] An exception may be where the plan is "locked in," e.g., where the contributor cannot withdraw money from the plan before a certain date such as his or her 65th birthday.

[4] In this report, we refer to the debtor claiming the exemption as the "depositor." This term is sufficiently accurate in most cases. In the context of spousal RRSPs, however, the exemption would be claimed, not by the spouse depositing money to the plan but by the owner of the plan into which the payment is made.

[5] Uniform Law Conference of Canada, *Proceedings of the Eightieth Annual Meeting* (Halifax: The Conference, August, 1998) at 254-273 [*ULCC Consultation Report*]; Uniform Law Conference of Canada, *Proceedings of the Eighty First Annual Meeting* (Winnipeg: The Conference, August, 1999) at 164-180 [*ULCC Uniform Bill*]. The ULCC website is helpful, online: <http://www.ulcc.ca/en/home> (last accessed March 20, 2004).

(2) The exempt status of these plans should continue only so long as they retain their status as RRSPs, DPSPs and RRIFs under the *Income Tax Act*.[4]

(3) Payments[5] out of such plans to a depositor or the legal representative of a depositor should be subject to exemptions like those which apply to wages and salary payments, but any amounts over the exemptions should be subject to garnishment.

The *ULCC Consultation Report* was the subject of extensive consultation, the results of which were divided but on balance favoured the proposals.[6]

[6] A second reform effort has been launched by the Superintendent of Bankruptcy. In 2000, the Superintendent created a Personal Insolvency Task Force (Task Force) to consider changes to the *Bankruptcy and Insolvency Act*.[7] The final report of the Task Force, published in December, 2002, proposes that people in bankruptcy should be able to claim an exemption of RRSPs surrounded by stringent anti-abuse safeguards not in the ULCC proposal.[8] There is no guarantee that the Task Force proposals will find favour with the Superintendent of Bankruptcy or with Parliament.

[7] The narrowness of the Task Force exemption proposal is explained in part by the necessity in bankruptcy to gather up as much of the bankrupt's property as possible because the provable claims will be discharged at the end of the process.

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[4] R.S.C., 1985, c. 1, (5th Supplement).

[5] The use of the word "payment" in the *ULCC Consultation Report*, *supra* note 5 and the *ULCC Uniform Bill*, *supra* note 5, creates confusion. See *infra*, c. 2. See also C.R.B. Dunlop, "Should Creditors Have Access to Future Income Savings Plans?" (2003) 66 Sask. L. Rev. 279 at 293-295 [Dunlop, "Should Creditors?"]. In this report, we use "money obligations," "obligations to pay" and "money payable" to refer to promises to pay before the money is paid, and "payments" to mean the money actually paid to the debtor. Some of our quotations use "payments" in a different sense.

[6] At the date of this report, a version of the *ULCC Uniform Bill*, *ibid.*, has been enacted by only one jurisdiction. See *The Registered Plan (Retirement Income) Exemption Act*, S.S. 2002, c. R-13.01, proclaimed in force March 4, 2003 [*Registered Retirement Plans Exemption Act*]. The statute is attached as Appendix C.

[7] R.S.C., 1985, c. B-3.

[8] Personal Insolvency Task Force, *Final Report* (Ottawa: Industry Canada, 2002) at 17-24, online: <http://strategis.ic.gc.ca/SSG/bi01221e.html> [*Task Force Report*]. The *Task Force Report* does not mention DPSPs or RRIFs.

This narrowness may be less essential or desirable in a provincial judgment enforcement system where the judgment survives until it is paid or until other events occur which are not relevant here. The Task Force ideas are less useful in a study of provincial exemptions.

[8] The Task Force report was recently considered by the Standing Senate Committee on Banking, Trade and Commerce. Following presentations by several individuals and groups, the committee issued its report in November 2003, dealing with numerous issues in personal and corporate bankruptcy.[11] On exemptions for RRSPs, the report recites the evidence and submissions and then concludes that some exemption is needed. The committee expresses concern with the divergent treatment of insurance and non-insurance RRSPs but also identifies differences between pensions and RRSPs. The committee had earlier "expressed support for exempting all RRSPs from seizure in bankruptcy, subject – of course – to appropriate measures to prevent abuse."[12] The report goes on to propose an exemption subject to a modified version of the limits proposed by the Task Force.

[9] During the summer of 2001, the Alberta Law Reform Institute (Institute) conducted a feasibility study to consider whether it should conduct a project on the exemption of RRSPs, DPSPs and RRIFs. People and groups consulted, including senior government officers, unanimously agreed that the present project was one which the Institute should take on. The Institute Board decided in September, 2001, to undertake the Future Income Plans project. It asked C.R.B. Dunlop, a consultant to the Institute, and Cynthia Martens, counsel to the Institute, to conduct the project, assisted by a project management group and by project advisory committees in Edmonton and Calgary. In June, 2002, the Institute published *Creditor Access to Future Income Plans: Consultation Memorandum No. 11*. The Institute received several responses to the consultation memorandum which have

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[11] Standing Senate Committee on Banking, Trade and Commerce, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (Ottawa: The Committee, 2003) at 24-29; online: <http://www.parl.gc.ca/37/2/parlbus/commbus/senate/com-e/bank-e/rep-e/bankruptcy-e.pdf> [*Senate Committee Report*].

[12] *Ibid.* at 28-29.

been very helpful in the writing of this report.[13] Counsel also conducted some research to compare the treatment of pensions and RRSPs, DPSPs and RRIFs in Alberta law.[14]

B. Scope of Project

[10] The principal issue in this report is whether RRSPs, DPSPs and RRIFs, whether sold by insurance companies or not, should be wholly or partly exempt from the remedies of creditors of the owner of the plan.[15] The exempt status of other types of future income plans is not considered here. In light of the ongoing discussions of reform by the Superintendents of Pensions, the report makes no recommendations on pensions exemptions.

[11] Debtors on the eve of insolvency have been known to transfer their assets to trustworthy relatives, or to transform their property from a non-exempt to an exempt form[16] in an effort to defeat their creditors. Both federal and provincial legislation provide processes for creditors to challenge such self-serving transfers, although counsel and bankruptcy trustees have expressed doubt to us about the effectiveness of the present law against the determined debtor. The Institute is aware of the problems in the law of reviewable transactions, and will consider a project in the future to review provincial[17] fraudulent conveyance and preference legislation. The Institute is unlikely to solve these complex and much debated problems as a footnote to the present report.

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[13] Names of consultants are listed in Appendix A to this report.

[14] The Institute made a submission to the Senate Committee in September, 2003.

[15] We also consider the exemption of locked-in retirement accounts (LIRAs), life income funds (LIFs) and locked-in retirement income funds (LRIFs). See recommendation no. 7.

[16] See e.g., *Royal Bank of Canada v. North American Life Assurance Co.*, [1996] 1 S.C.R. 325, 3 W.W.R. 457 [*Royal Bank*].

[17] Although one of the two major "provincial" acts is the English Statute of Elizabeth, passed in 1571, and still in force and in use in Alberta today. See *Fraudulent Conveyances Act, 1571* (U.K.), 13 Eliz. I., c. 5, made perpetual by the *Continuance, etc. of Acts, 1586-87* (U.K.), 29 Eliz. I., c. 5. See also *Fraudulent Conveyances Act, 1584-85* (U.K.), 27 Eliz. I., c. 4 [*Statute of Elizabeth*].

[12] The purpose of this project is to ask whether Alberta exemptions from creditors' remedies should treat non-insurance future income plans in a similar way to pensions and insurance future income plans. It is not our goal to review judgment enforcement law generally. The Institute did that job in our report *Enforcement of Money Judgments*[18] which was published in 1991 and which led to the *Civil Enforcement Act*.[19] Any exemption proposed in this report is intended to fit into the existing law with as little modification as possible consistent with our recommendation.

[13] This approach needs to be fleshed out in two specific cases. The first has to do with exceptions from exemptions. Exemptions provisions usually say that they do not apply to certain claimants or causes of action. For example, s. 93 of the *Civil Enforcement Act* provides that the exemptions in Part 10 of the Act do not apply to (1) an enforcement debtor that is not an individual, (2) partnership property, (3) maintenance or alimony claims, (4) abandoned property, and (5) writ proceedings on a money judgment arising from an act for which the enforcement debtor has been convicted of a criminal offence. Exceptions to exemptions exist in other legislation like the *Maintenance Enforcement Regulation*.[20] We have concluded that it is wrong in a study of one type of asset to engage in a study of exceptions which currently apply to all exempt assets. Anything we propose in this report is not intended to alter the present law regarding exceptions to exemptions in the *Civil Enforcement Act* or elsewhere. That law remains the same and applies to our proposed new exemption.

[14] The second specific case is that of the survival of exemptions through changes in the form of the exempt asset. For example, a debtor whose unpaid wages are garnisheed has a right to an exemption of part of the wages.[21] The

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[18] Alberta Law Reform Institute, *Enforcement of Money Judgments*, 2 vols. (Report No. 61) (Edmonton: The Institute, March 1991) [ALRI, *Enforcement of Money Judgments*]. All subsequent references are to volume 1.

[19] R.S.A. 2000, c. C-15 [*Civil Enforcement Act*].

[20] Alta. Reg. 2/1986, s. 13.

[21] *Civil Enforcement Act*, *supra* note 19, s. 81; *Civil Enforcement Regulation*, Alta. Reg. 276/1995, (continued...)

employer is required to pay the exempt part of the wages to the employee and the rest to the Clerk of the Court.[22] However, suppose that the employee has been paid his wages. As we understand the law and the *Civil Enforcement Act*, wages actually paid to the employee-debtor may be exigible (if the debtor is in possession of the cash or cheque) and are probably garnishable (if the wages have been deposited to the debtor's bank account).[23] Where the wages have been paid by the employer directly into the employee's deposit account, the employee may apply to Court for an order that part of the bank account be exempt.[24] Where no application is made regarding wages paid directly into the bank, and in all other situations, it is likely that no exemption exists and the money is fully garnishable.

[15] The law on the survival of exemptions through changes in form is confused and a subject of controversy. Some lawyers and judges assume that the common law interprets exemptions restrictively so that they do not survive any change in the form of the exempt asset. Others read exemptions more broadly and would find a limited right to "trace" exemptions into successor funds or assets. The common law has been modified by legislation, but approaches range from limiting the exemption to extending it to the bank account into which the cheque is paid.

[16] We have considered whether to propose that any exemption of future income plans continue to apply, despite a change in the form of the exempt asset. A good example is a depository holding a RRIF of a debtor which pays the debtor $500 a month. We will later conclude that the obligation to pay should be exempt. But suppose the money is paid to the debtor? Should the exemption extend to the cash or cheque in the hands of the debtor, or the bank account into which the cash or

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[21] (...continued)
ss. 39-40 [*Civil Enforcement Regulation*].

[22] *Alberta Rules of Court*, Alta. Reg. 390/68, rr. 474, 476 [*Alberta Rules of Court*].

[23] But see *Toronto-Dominion Bank v. Grossman* (1982), 132 D.L.R. (3d) 566 (N.B.C.A.). See generally C.R.B. Dunlop, *Creditor-Debtor Law in Canada*, 2d. ed. (Toronto: Carswell, 1995) at 502-506 [Dunlop, *Creditor-Debtor Law in Canada*].

[24] *Civil Enforcement Act*, *supra* note 19, s. 83(3).

cheque is deposited? We have concluded that, with one exception,[25] this issue should be reviewed in a general examination of judgment enforcement law and not in a project narrowly concerned with the exemption of one type of property. We are concerned, however, with the uncertainty and confusion surrounding the survival of exemptions after changes in form, and urge the legislature to re-examine these rules with a view to clarifying and simplifying the law.

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[25] See recommendation 9.

CHAPTER 2. PRESENT LAW

A. Introduction

[17] Canadian law espouses two major legal policies relevant to this report. They are (1) the legal encouragement to save for retirement, and (2) the necessity for an effective system for the enforcement of money judgments. These policies come into direct conflict in any project to exempt RRSPs, DPSPs and RRIFs from creditors' remedies. This chapter will outline the two policies and how Canadian law has reconciled them. It will also look at how other countries have addressed the problem.

B. Saving for Retirement

[18] It is obvious that people who retire from their work need resources to survive, although a recent Statistics Canada study argues that many Canadians have not saved enough to provide an adequate income during retirement.[26] Successive governments have been concerned with the plight of retired people, and have provided a safety net including modest public assistance and insurance plans for retirees, such as Old Age Security, the Canada Pension Plan, and other pension, insurance and welfare programs. The same governments have also encouraged people to save for retirement and to rely on their own resources instead of the public purse.

[19] People will probably need to take more responsibility for saving for their retirement in the future. People live longer, and the fear of outliving one's savings has some basis in fact, especially if governments decide to weaken the safety net and medicare. In the ten years from 1990 to 2000, "private pensions," that is, registered pension plans and RRSPs, have become the largest single source of the total income of seniors, compared to Old Age Security, Canada and Quebec Pension Plans, investments and employment.[27] In a recent survey of working and

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[26] Statistics Canada, *The Assets and Debts of Canadians: An Overview of the Result of the Survey of Financial Security* (Ottawa: Statistics Canada, 2001) at 23-35, online: <http://www.statcan.ca/english/freepub/13-595-XIE/9900113-595-XIE.pdf> [Stats. Can., *Assets and Debts*].

[27] Statistics Canada, *Canada's Retirement Income Programs*, in Statistics Canada, *The Daily*, (continued...)

retired Canadians, 72% of non-retired people were strongly considering working in some capacity after they retired, a goal which might be frustrated as only 23% of retirees indicated that they were actually working.[28] In Alberta, the gap was larger as 75% of non-retired people were strongly considering working, while only 15% of retirees indicated that they were actually working.[29] An international study shows that, where the law is changed to make it more difficult to finance retirement, people are likely to work longer.[30]

[20] Historically, many public and private employees have relied on pension plans provided by their employers and regulated by superintendents of pensions across the country, although the trend since 1990 has been towards fewer pensionable jobs as a percent of the total available.[31] Pension legislation usually exempts pensions from execution and garnishment.[32] Some employers offer private sector plans which are substitutes for or supplements to pensions, such as group RRSPs and DPSPs. Such plans are usually not caught by pensions legislation and may offer less protection to the employee.

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[27] (...continued)
(Ottawa: Statistics Canada, 14 February 2003), online: <http://www.statcan.ca/Daily/English/030214/d030214a.htm> (last accessed March 19, 2004) [Stats. Can., *Canada's Retirement Income Programs*].

[28] Investors Group Media Release, *Majority of Canadians Plan to Work During Retirement* (21 January 2003), online: <http://www.investorsgroup.com/english/about_us/news_releases/2003/030121cdns_work.htm> [Investors Group Media Release]. The survey was sponsored by Investors Group and conducted by Decima Research. The unwillingness to hire retirees may be a result of mandatory retirement and pension policies, or it may flow from employer discrimination, based on fear of illness or injury. Unions have from time to time supported mandatory retirement.

[29] Investors Group News Release, *Seventy-five per cent of Albertans Plan to Work During Retirement* (21 January 2003) [Investors Group News Release].

[30] Jonathan Gruber and David A. Wise, *Social Security Programs and Retirement Around the World: Micro Estimation* (Cambridge, Massachusetts: National Bureau of Economic Research, December, 2002), online: <http://www.nber.org/papers/w9407>. The study's narrow finding is that, if a reform delays by three years eligibility for an old age benefit, the reform is on average likely to discourage between 23 and 36 percent of men aged 56 to 65 from leaving the work force. The study is based on findings from 12 countries, including Canada.

[31] "In 1999, 40% of the labour force put money into an RRSP, up from 32% at the start of the decade. In contrast, just one-third of the labour force contributed to a Registered Pension Plan in 1999, compared with 37% in 1991." See Stats. Can., *Canada's Retirement Income Programs*, *supra* note 27.

[32] See e.g., *Employment Pension Plans Act*, R.S.A. 2000, c. E-8, s. 85 [*Employment Pension Plans Act*].

RRSPS, DPSPS and RRIFs

[21] Government desire to encourage people to save for their own retirement was implemented in the RRSP tax deferral program, first enacted in 1957.[33] The intention was to register certain retirement savings programs which could act as an alternative or supplement to traditional pension plans. For the first 20 years, RRSPs were not particularly popular, the market being largely confined to deposits with insurance and trust companies. Cohen and Fitzgerald say that the growth in investment in RRSPs began in the mid-1970s with the entry of the chartered banks in to the market, accompanied by the now-familiar barrage of advertising.[34] Another incentive to growth was the increase in contribution limits to RRSPs in the 1991 changes to the *Income Tax Act*.[35] For many, RRSPs were the best equivalent to pension plans where employers did not provide such plans or where workers were self-employed.

[22] Whatever the reason, RRSPs have proven to be enormously popular. A recent Statistics Canada study found that, from 1993 to 1999, of the 13 million Canadian tax-filers aged 25 to 64, 61% contributed to an RRSP in at least one year compared to 45% who contributed to a registered pension plan (RPP). Tax-filers saved 44.5 billion dollars through RPPs and RRSPs in 1999; of that total, RRSP normal contributions reached 24.4 billion dollars (55%).[36] RRSP use increases as income increases, although other factors like geography and gender are relevant. A significant finding is that 59% of Canadians aged 25 to 64 who filed tax returns in

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[33] Cohen, Bruce and Brian Fitzgerald, *The Pension Puzzle: Your Complete Guide to Government Benefits, RRSPs, and Employer Plans* (Etobicoke, Ont.: J. Wiley and Sons, 2001), c. 7; Alberta Law Reform Institute, *Beneficiary Designations: RRSPs, RRIFs and Section 47 of the Trustee Act* (Report No. 68) (Edmonton: The Institute, September 1993) at 18-20. The following discussion concentrates on RRSPs, although the history is similar for RRIFs and DPSPs. See also *Re Coopérants, Mutual Life Insurance Society* (1993), 58 O.A.C. 211; leave to appeal to S.C.C. refused, (1994), 170 N.R. 79 (S.C.C.) [*Re Coopérants*]. On the *Re Coopérants* line of cases, see Maddaugh, P.D., "Are Deferred Annuities Policies of Insurance?" (1993) 2 Directions 14.

[34] Cohen and Fitzgerald, *ibid.* at 77.

[35] Gordon M. Hall, ed., *Mercer Handbook of Canadian Pension and Benefit Plans*, 11th ed. (North York, Ont.: CCH Canadian, 1996) at 221 [*Mercer 1996*].

[36] Statistics Canada, *Retirement Savings Through RPPs and RRSPs 1999* (Ottawa: Statistics Canada, 2001) at 16-17, 22-30, online: <http://dsp-psd.pwgsc.gc.ca/Collection-R/Statcan/74F0002XIB/0009974F0002XIB.pdf> [Stats. Can., *RPPs and RRSPs*].

1999 did not use any of their RRSP room for contributions, despite the blandishments of the advertisers.[37]

[23] In a separate study on the assets and debts of Canadians, Statistics Canada concluded that, in 1999, "private pension assets," defined as including RRSPs, RRIFs, employer pensions, annuities and DPSPs, accounted for close to 29% of the value of all assets of Canadian family units. The total estimated value of private pension assets was just over 1 trillion dollars, of which 408 billion dollars was saved in RRSPs and RRIFs.[38] Private pensions were the second-most significant asset of Canadian family units, the most valuable being the home. These assets must be considered in any discussion of readiness for retirement and financial security for the future.[39]

[24] The Canadian market now offers a bewildering array of RRSPs and RRIFs offered by banks, insurance companies, trust companies, credit unions, and mutual fund companies. The one quality which holds these products together is their compliance with the *Income Tax Act* requirements for an RRSP or a RRIF.[40]

[25] An RRSP is a retirement savings plan established by the taxpayer and registered by the Canada Customs and Revenue Agency (CCRA).[41] An RRSP can

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[37] *Ibid.* at 32-34.

[38] Stats. Can., *Assets and Debts*, *supra* note 26 at 9-11. Employer pension plans accounted for 604 billion dollars.

[39] *Ibid.*

[40] Our study does not include two categories of assets: (1) investment or savings vehicles available in the market but which do not conform to the requirements of the *Income Tax Act*, *supra* note 6, for RRSPs and RRIFs, and (2) RRSPs which have lost their tax-deferred status by, for example, being amended to include a charge to the bank holding the RRSP. Their exclusion is discussed in chapter 3 of this report. Group RRSPs created by employers as supplements to or substitutes for pensions are treated as a collection of individual RRSPs by the *Income Tax Act*. See *Mercer 1996*, *supra* note 35 at 223-225. That approach is followed in this report. Our discussion concentrates on the tax treatment of RRSPs, DPSPs and RRIFs, but a roughly similar system applies to pensions.

[41] The root legislation is the *Income Tax Act*, *ibid.*, s. 146. CCRA publishes useful guides to the law. See e.g. 2003 *RRSPs and Other Registered Plans for Retirement* 14040, online: <http://www.ccra-adrc.gc.ca/E/pub/tg/t4040/t4040-e.html>. There are similar tax regimes for DPSPs

(continued...)

contain a wide range of assets, from a bank account to securities and mutual fund units, although there are some limits. The plan may or may not be self-directed.

[26] An amount contributed to an RRSP is deductible in computing a taxpayer's income as long as the amount does not exceed the taxpayer's annual RRSP deduction limit, which is fixed for each taxpayer in the previous year's Notice of Assessment. The maximum limit for annual contributions to an RRSP is generally a function of a taxpayer's earned income (subject to a maximum) and is adjusted (reduced) by amounts contributed to other registered plans. The maximum for the 2003 income tax year is $14,500. The annual contribution limits for RRSPs will be increased in steps to $18,000 by 2006, and will be indexed for tax years thereafter. Any unused portion of the contribution limit may be used in subsequent taxation years. Overcontribution balances greater than $2,000 are generally subject to a tax of 1% per month. Income earned in an RRSP is generally not taxable while it remains in the plan. When money is withdrawn from the plan, it is taxable to the plan annuitant in the year of withdrawal. An RRSP can lose its tax exempt status if it ceases to fit within the rules set out in s. 146 of the *Income Tax Act*.

[27] RRSPs must mature and begin paying retirement income no later than the year the annuitant attains 69 years of age. Taxpayers whose RRSPs have not matured before that time typically transfer the property from their RRSPs to RRIFs, or cause the property to be invested in an annuity to begin paying retirement income. A RRIF is a plan registered by the CCRA and established by the taxpayer by the transfer of property from an RRSP, an RPP or another RRIF. A RRIF must pay to the taxpayer a minimum amount each year after the year it is set up. Such payments are taxable to the annuitant.

[28] A deferred profit-sharing plan (DPSP) is an arrangement by which an employer can share with some or all of its employees the profits from the business

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[3] (...continued)
(*Income Tax Act*, *ibid.*, s. 147) and RPPs (*Income Tax Act*, *ibid.*, ss. 5, 147.1). For a trenchant criticism of the RRSP program, see Barbara Austin, "Policies, Preferences and Perversions in the Tax-Assisted Retirement Savings System" (1996), 41 McGill L.J. 571. ALRI acknowledges with gratitude the assistance of Wanda Rumball of Felesky Flynn LLP for her assistance on the tax aspects of this report.

or related businesses up to an annual maximum contribution.[42] Like group RRSPs, DPSPs may be used by the employer to supplement or as a substitute for a pension plan. The amounts paid into such plans are usually calculated on the basis of profits. Allocations to an employee's account must become the employee's property if the employee has completed 24 months of DPSP membership, but they are not taxable as part of the employee's income as long as the allocations remain in the plan. Like RRSPs but unlike most pensions, a retiring employee can withdraw his or her DPSP money as a lump sum and is not required to invest it in an LRIF or a RRIF. Generally, benefits received by an employee are taxable, except for the return of the employee's own contributions (permitted before 1991), and funds used to purchase specified annuities.

C. Enforcement of Money Judgments Against RRSPS, DPSPS and RRIFs in Alberta

[29] In 1991, the Institute published *Enforcement of Money Judgments*[43] which proposed far-reaching changes in the Alberta judgment enforcement system. The report begins with the uncontroversial proposition that just and efficient processes for the enforcement of judgment debts are essential.

> What use is a judicial system that purports to resolve a dispute if the resolution it determines cannot be implemented effectively? Moreover, a just and efficient enforcement system is necessary if credit is to continue to play its fundamentally important role in the operation of our commercial system.[44]

[30] One way to make the judgment enforcement system more effective is to provide that all property of the judgment debtor can be subject to enforcement by the creditor, excepting only property that has been deliberately exempted from enforcement. The Institute in its first recommendation called for universal

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[42] See CCRA, *Deferred Profit Sharing Plans* IC77-1R4; *Mercer 1996*, *supra* note 35 at 229-231; Cohen and Fitzgerald, *supra* note 33 at 69-70; David E. Tyson, *Profit Sharing in Canada: The Complete Guide to Designing and Implementing Plans that Really Work* (Toronto: J. Wiley, 1996), see especially c. 9.

[43] ALRI, *Enforcement of Money Judgments*, *supra* note 18.

[44] *Ibid.* at 21.

exigibility of property of the debtor.[45] Its second recommendation dealing with exemptions should be quoted in full:

> Just Exemptions
>
> The deliberately exempted property should be sufficient to permit debtors to maintain themselves and their dependents at a reasonable standard and to have reasonable security that they will be able to continue to do so in the future.[46]

[31] These recommendations were implemented in the *Civil Enforcement Act*[47] which, with some significant exceptions, followed the Institute Report. The *Civil Enforcement Act*, read as a whole, makes it clear that all property of the debtor is subject to enforcement,[48] garnishment[49] and receivership,[50] unless declared by the Act, the *Civil Enforcement Regulation*, or some other law to be exempt. Most exemptions under provincial legislation apply in bankruptcy.[51]

[32] This report is primarily concerned with the enforcement of unsecured judgments, but it is appropriate to say something about a peculiar fetter on the rights of one class of secured creditors. A depository may lend money to someone who wishes to place the proceeds in an RRSP. Depositories who make such loans may secure themselves by taking an assignment of the RRSP or any proceeds from the plan. The lower courts were divided on such a transaction. One line of cases held that the assignment is illegal because the *Income Tax Act* prohibits it.[52] The

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[45] *Ibid.* at 24-25.

[46] *Ibid.* at 25. See also c. 9 at 254-325, which sets out detailed recommendations on exemptions.

[47] *Supra* note 19. See also *Civil Enforcement Regulation*, *supra* note 21; *Alberta Rules of Court*, *supra* note 22, rr. 340-383.1 (enforcement); 470-481.1 (garnishment).

[48] *Civil Enforcement Act*, *ibid.*, ss. 1(1)(u), 2(b), 43, 73, 88-93.

[49] *Ibid.*, ss. 77-81.

[50] *Ibid.*, s. 85.

[51] *Bankruptcy and Insolvency Act*, *supra* note 9, s. 67(1)(b). As to earnings of the bankrupt, see s. 68.

[52] *Bank of Nova Scotia v. Phenix (Trustee of)*, [1990] 1 W.W.R. 542, (1989) 73 C.B.R. (N.S.) 290 (Sask. C.A.); *Re Leavitt* (1997), 50 C.B.R. (3d) 97 (B.C.C.A.); *Re Buwalda* (1997), 202 A.R. 310; 49 C.B.R. (3d) 281 (Q.B.); cf. *Belliveau v. Royal Bank* (2000), 14 C.B.R. (4th) 17 (N.B.C.A.). The cases

(continued...)

other group of cases found the assignment to be legal and enforceable by the depository, its only effect being to strip the RRSP of its tax exemption status.[53] The issue now appears to have been settled by the Supreme Court of Canada in favour of the view that the *Income Tax Act* does not render the security a nullity.[54] Even so, lenders and borrowers may be reluctant to negotiate a security on an RRSP which appears to eliminate the tax exemption of such a plan. One can quarrel with the reasonableness of a rule which denies to a lender security on an asset purchased or made more valuable as a result of the loan. Creditors can secure themselves on other property, even when exempt. Why should RRSPs be different? The issue is complex and outside the scope of the present report, but the Institute flags the problem as one deserving attention in the near future.

1. Enforcement

[33] Section 2(b) of the *Civil Enforcement Act* provides that "except as otherwise provided for in this or any other enactment, all property of an enforcement debtor is subject to writ proceedings under this Act." The Act later makes it clear that personal and real property available to the creditor must be exigible, that is, "not exempt."[55] While the Act does not create special provisions applying only to RRSPs,[56] the meaning as a whole is plain: a judgment creditor can enforce a judgment against all property of a debtor, including interests in pensions, RRSPs, DPSPs and RRIFs, *unless they are declared to be exempt by some legislation*.[57]

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[53] (...continued)
turn on the *Income Tax Act*, *supra* note 6, ss. 146(2), 146(12). As to this and the next footnote, see articles by Michael J. McCabe, "Execution Against an R.R.S.P." (1990) 76 C.B.R. (N.S.) 218 at 235-237; and John R. Williamson, "The No Offset Clause in RRSPs: A Contractual Exemption" (2001) 20 Nat'l Banking L. Rev. [in two parts] 65, 81.

[54] *Caisse populaire St-Pierre Claver c. Caisse (syndic)* (1993), 25 C.B.R. (3d) 218 (Que. S.C.); *Re Whaling* (1998), 117 O.A.C. 51 (C.A.); cf. *Caisse populaire Laurier c. Cie. Trust Royal (C.A.Q.)* (1989), 30 Q.A.C. 86 (C.A.).

[54] *Caisse populaire Desjardins de Val-Brillant c. Blouin*, [2003] 1 S.C.R. 666.

[55] *Civil Enforcement Act*, *supra* note 19, ss. 1(1)(u), 2(b), 43, 73, 88-93.

[56] Other assets, like cash, instruments, secured obligations and securities, are given special treatment in Part 6 of the *Civil Enforcement Act*, *ibid.*

[57] Exemptions are discussed later in this chapter.

[34] The majority of decided cases here and elsewhere in Canada make it clear that RRSPs and RRIFs are exigible assets.[48] There are very few cases on DPSPs, but the answer is likely the same.[49] In Alberta, the leading case is *Capital City Savings & Credit Union Ltd. v. 299474 Alberta Ltd.*, decided (in two parts) before the enactment of the *Civil Enforcement Act*. In the first *Capital City Savings* case,[50] Master Funduk concluded that an RRSP could be seized, but refused to collapse the plan on the evidence before him. In a later application, Master Quinn permitted the plan to be collapsed.[51]

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[48] RRSPs have been held to be exigible or property of the bankrupt in the following provinces:
Alberta - *Capital City Savings & Credit Union Ltd. v. 299474 Alberta Ltd.* (1989), 102 A.R. 93 (Q.B.); (1990), 105 A.R. 255 [*Capital City Savings*];
British Columbia - *M.N.R. v. Guerrero*, [1994] F.C.J. No. 1076 (F.C.T.D.); *Re Bodnarchuk*, [1995] 3 F.C. 300 (F.C.T.D.); cf. *Vancouver A and W Drive-Ins Ltd. v. United Food Services Ltd.* (1981), 38 B.C.L.R. 30 (S.C.) [A and W];
Saskatchewan - *Re Libiben* (1977), 78 D.L.R. (3d) 444 (Sask. Q.B.), aff'd (1977) 25 C.B.R. (N.S.) 232 (C.A.); *Delaire v. Delaire* (1996), 147 Sask. R. 161 (Q.B.) (dicta);
Manitoba - *C.I.B.C. v. Meltzer* (1991), 6 C.B.R. (3d) 1 (Man. Q.B.); *Re Sinclair* (1993), 63 F.T.R. 286;
Ontario - *National Trust v. Lorenzetti* (1983), 148 D.L.R. (3d) 575 (Ont. H.C.); *Re Katz* (1984), 52 C.B.R. (N.S.) 311 (Ont. S.C.) (dicta); *Morgan Trust Co. v. Dellelce*, [1985] 2 C.T.C. 370 (Ont. S.C.) [*Dellelce*]; *Re Swanborough* (1985), 55 C.B.R. (N.S.) 98 (Ont. S.C.);
Quebec - *Re Donyon*, [1982] 134 D.L.R. (3d) 324 (Que. S.C.).
New Brunswick is an exception. See *Watt v. Trail* (2000), 583 A.P.R. 334 (N.B.C.A.); cf. *Re Greening* (1989), 73 C.B.R. (N.S.) 24 (N.B.Q.B.).
See also Dunlop, *Creditor-Debtor Law in Canada*, *supra* note 23 at 268-269, 274; Lloyd W. Houlden and Geoffrey B. Morawetz, *The 2001 Annotated Bankruptcy and Insolvency Act* (Scarborough, Ont.: Carswell, 2000) at 316-318; David Norwood and John P. Weir, *Norwood on Life Insurance Law in Canada*, 3rd ed. (Toronto: Carswell, 2002), cc. 9 and 11 [Norwood, *Life Insurance Law*]; Lyman R. Robinson, *British Columbia Debtor-Creditor Law and Precedents*, looseleaf (Scarborough, Ont.: Carswell, 2002) at 5.39-5.41; and articles by Françoise Belzil, "Seizure of Personal Property" in Legal Education Society of Alberta, *Civil Enforcement Act* (Continuing Professional Competence Seminar, Legal Education Society of Alberta, 9 April 1996); Peter L. Biro, "The Erosion of Life Insurance RRSP Immunity from Creditor's Claims" (1993) 13 E. & T.J. 153; Anita B. Kagna, "Execution Against Insurance RRSPs" (1995) 10 National Creditor Debtor Rev. 42; R.W. Law, "From the Law Reports: *Re Bliss*" (1985) 7 E. & T.Q. 1; McCabe, *supra* note 52; M.A. Springman and Eric Gertner, "Enforcement Against Life Insurance, Pensions, and RRSP's," in M.A. Springman and Eric Gertner, eds. *Debtor-Creditor Law: Practice and Doctrine* (Toronto: Butterworths, 1985); Brian Taylor, "Execution against R.R.S.P.'s" (1985) 1 National Creditor/Debtor Rev. 13.

[49] *Re Rogers* (1993), 18 C.B.R. (3d) 239 (N.S.T.D.); cf. *Re Touche Ross Ltd. and Neuls et al.* (1985), 37 Sask. R. 60, 17 D.L.R. (4th) 554 (Sask. C.A.) [*Re Neuls*].

[50] *Capital City Savings*, *supra* note 58.

[51] *Ibid.*

[35] Under the *Civil Enforcement Act*, the process for seizing and collapsing an RRSP is likely as follows:

- The judgment creditor instructs a civil enforcement agency to seize the RRSP under s. 45 of the Act by serving the appropriate notices on the depository and the debtor.
- The agency (or perhaps the creditor) instructs the depository to collapse the plan, relying on s. 8 of the *Civil Enforcement Act*. The agency is simply exercising the power of the debtor to collapse his or her plan.[62]
- The depository must deduct the required withholding tax and any agreed-on fees payable to itself, and pay the balance to the agency for distribution to creditors entitled to share under Part 11 of the *Civil Enforcement Act*.

2. Enforcement against locked-in RRSPs

[36] The Institute received several comments about some observations in the consultation memorandum about what is meant by a locked-in RRSP and whether such an asset is exigible under present law. The term "locked-in" appears to have been derived from the law of pensions. It means that "the employee cannot withdraw any contributions or portion of the benefit in cash"[63] but only in retirement income. In Alberta, pensions are different from RRSPs in that pensions after vesting are, with exceptions, locked in. Locking-in is clearly the rule for pension plans currently under the *Public Sector Pension Plans Act*.[64] It is likely that most pensions under the *Employment Pension Plans Act*[65] are also locked in, although it is possible that the pension agreement can provide otherwise.

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[62] A trustee in bankruptcy would appear to have the power to deregister a non-exempt RRSP. See *Re Katz*, *supra* note 58; *Re Swanborough*, *supra* note 58; but see *Re McKenster* (1985), 10 C.C.E.L. 193, 58 C.B.R. (N.S.) 308 (N.S.T.D.). See also Steven Kleiner: "Registered Retirement Savings Plans Owned by Bankrupts: Recent Change in the Law" (1977) 24 C.B.R. (N.S.) 239; Houlden and Morawetz, *supra* note 58 at 317.

[63] Greenan, J., *The Handbook of Canadian Pension and Benefit Plans*, 12th ed. (Toronto: CCH Canadian Limited, 2002) at 43-44.

[64] R.S.A. 2000, c. P-41.

[65] *Supra* note 32.

[37] Almost all individual RRSPs and some group RRSPs are not locked in. The depositor can withdraw some or all of the funds or assets in an RRSP so long as the depositor pays the relevant income tax and, in some cases, charges imposed by the depository. The market appears not to have developed an individual locked-in RRSP, although such a plan could be created by contract if the parties so wished. RRSPs are registrable under the *Income Tax Act*,[66] whether locked in or not. There are two exceptional situations.

[38] The first exception includes the specialized instruments referred to as LIRAs, LIFs and LRIFs. When an employee who is a member of a pension plan terminates employment before the earliest age when he or she can obtain a pension, the employee can usually transfer the commuted value[67] of the pension to a locked-in retirement account or LIRA. A LIRA is a type of RRSP designed specifically to hold locked-in pension funds. It is subject to extensive and detailed regulation under Alberta pensions statutes. Among other limits, funds or assets in a LIRA are locked in. After a certain age, an owner of a LIRA must transfer the funds or assets in the LIRA to another type of locked-in plan, such as a life income fund (LIF) or a locked-in retirement income fund (LRIF). LIFs and LRIFs are specialized forms of RRIFs used to hold and distribute locked-in funds. Funds and assets in such plans are locked in subject to minimum and maximum amounts which can be withdrawn annually. As a pension regulator told us, LIRAs, LIFs and LRIFs are similar to pensions in that they provide an income for life.[68]

[39] The second exception arises in some group RRSP plans where the agreement between the employer and all the participating employees limits or prohibits

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[66] *Supra* note 6.

[67] Commuted value is defined as "the amount of an immediate lump sum payment equal to the actuarial value of a future series of benefit payments." See Watson Wyatt Worldwide, *Canadian Pensions and Retirement Income Planning* (Toronto: CCH Canadian Limited, 2001) at 16.

[68] The locking-in rules under the *Employment Pension Plans Act*, *supra* note 32, have recently been changed to permit withdrawals from LIRAs, LIFs and LRIFs for pensioners facing financial hardship. See *Employment Pension Plans (Financial Hardship Withdrawal - 2003) Amendment Regulation*, Alta. Reg. 133/2003. Other jurisdictions permit the collapse of LIRAs, LIFs and LRIFs in whole or part. See especially *Pension Benefits Amendment Regulations, 2002*, S. Reg., O.C. 32/2002, amending *Pension Benefits Regulations, 1993*, R.R.S. 1993, c. P-6.001, Reg 1.

withdrawals from an individual's RRSP during and in some cases after his or her employment. While pension regulators are reluctant to describe such plans as locked in, they are similar from the point of view of the employee who cannot get access to the funds or assets in the plan until termination of employment or retirement.

[40] The next question is whether locked-in RRSPs are not exigible or are exempt. One might expect pension legislation to say that LIRAs, LIFs and LRIFs are exempt from creditors' remedies. In our view, the exemption sections in the Alberta pensions statutes do not clearly exempt such plans.[69]

[41] If locked-in RRSPs are not declared by statute to be exempt, they are exigible, that is, the bundle of rights of the depositor/debtor can be seized by a civil enforcement agency.[70] It is true that the seizure may be an empty victory. If the depositor cannot withdraw money or collapse the plan, neither can the civil enforcement agency. There is some dispute in the cases on the extent of the rights of the seizing sheriff or agency.[71] However, there may still be situations where it would be helpful to seize or get a receivership order against a locked-in plan, especially where the locked-in period is nearly over or where a payment is expected. The objective of the creditor would be to seize the plan and put the depository on notice that, when the locked-in period expires, the depository is to collapse the plan and pay the proceeds to the agency on behalf of the creditors.

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[69] *Employment Pension Plans Act*, *ibid.*, s. 85, taken with the definition of "benefit" in s. 1(1)(e), does not expressly exempt LIRAs, LIFs or LRIFs, or money payable from them. It is not clear that they are impliedly exempt, either. The *Public Sector Pension Plans Act*, *supra* note 64, is similarly vague.

[70] The *Capital City Savings* cases, *supra* note 58, held that this was Alberta law before the *Civil Enforcement Act*, *supra* note 19 and that the statute has expanded the range of the writ of enforcement. See also Superintendent of Bankruptcy, *Directive 22: Realization of Estate Assets* (issued 1988; reissued 1991 and 1993).

[71] Compare *Capital City Savings*, *ibid.*; *Montreal Trust Co. of Canada v. Lafarge Canada Inc.* (1994), 126 Sask. R. 130 (Q.B.); and *Re MacKinnon* (1991), 3 C.B.R. (3d) 219 (N.S.S.C.). See also Springman and Gertner, *supra* note 58; David McKee, "Debtor-Creditor Issues Affecting Annuity Contracts" (1993) 12 E. & T.J. 242 and Taylor, *supra* note 58.

3. Garnishment

[42] One of the achievements of the *Civil Enforcement Act* was to extend substantially the range of money obligations which could be attached by the creditor.[72] Section 78(a) of the Act provides that "any current or future obligation is attachable by garnishment." Three definitions are significant. Section 77(1)(i) defines "obligation" to mean "a legal or equitable duty to pay money." A current obligation is defined as an obligation that on the day of service of a garnishee summons on the garnishee is payable, payable on demand or payable on satisfaction of a condition such as the presentation of a pass-book to a bank.[73] The definition of "future obligation" needs to be quoted in full:

> S. 77(1)(c) "future obligation" means an obligation or any portion of an obligation that is not a current obligation and that
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> (i) will arise or become payable in certain circumstances or at a certain time or times under
>
> (A) an existing agreement or trust,
>
> (B) an issued security, or
>
> (C) the will of a deceased person,
>
> (ii) will arise or become payable in the ordinary course of events from an existing employment relationship,
>
> (iii) is a statutory obligation that is likely to arise or become payable as a result of an event that has occurred, or
>
> (iv) may arise or become payable in respect of an existing cause of action.

The Act also provides for continuing garnishment under s. 79. A garnishee summons can be renewed under rule 479 of the *Alberta Rules of Court*.

[43] There is no case law directly on the garnishment of RRSPs and similar plans in Alberta. The cases from other jurisdictions may not apply here because they interpret different statutes. The non-Alberta cases are conflicting, but a majority conclude that RRSPs and the like are not garnishable until the depositor has agreed to or elected a payment scheme, or has agreed to collapse the plan, or unless the

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[72] See generally Susan Robinson Burns, "Garnishment" in Legal Education Society of Alberta, *Civil Enforcement Act* (Continuing Professional Competence Seminar, Legal Education Society of Alberta, 9 April 1996).

[73] *Civil Enforcement Act*, *supra* note 19, ss. 77(1)(a); 83(1).

RRSP agreement provides otherwise.[74] While garnishment in the *Civil Enforcement Act* is a much broader remedy, Alberta courts may well come to the same conclusion.

[44] Most RRSPs provide that the depositor, during what is often called the accumulation phase, will pay money or transfer assets into the plan. Unless the plan is locked in, the depositor may draw out some or all of the money or assets in the plan, subject to tax. Assuming that the depositor does not make any withdrawal but continues to accumulate money or assets, the plan agreement will provide that, at some later time, the depositor must make an election as to the disposition of the plan. Usually, the choice is to cash in the RRSP and pay tax on the money received, or convert the RRSP into an annuity or a RRIF.

[45] Until the election is made, the RRSP cannot be described as a current obligation under s. 77(1)(a) of the *Civil Enforcement Act*, and it is doubtful that it is a future obligation, that is, a money obligation which "will arise or become payable in certain circumstances or at a certain time or times under ... an existing agreement or trust" (to choose the applicable elements of s. 77(1)(c)). The law will

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[74] A majority of the decided cases find that RRSPs are not garnishable. See *A and W*, *supra* note 58; *Re Bliss* (1983), 44 O.R. (2d) 129 (Ont. H.C.); *Dellelce*, *supra* note 58; *DeConinck v. Royal Trust Corp. of Canada* (1988), 90 N.B.R. (2d) 321 (C.A.); *National Bank of Canada v. Creative Touch Millworks Inc.* (1988), 31 E.T.R. 312, [1989] 2 W.W.R. 180 (Sask. Q.B) [*Creative Touch*]; *Manufacturers Life Insurance Co. v. M.N.R.*, [1991] 2 C.T.C. 2171 (T.C.C.); *National Trust Co. v. R.*, [1997] 1 C.T.C. 2549 (T.C.C.); *Richmond Savings Credit Union v. Miller*, [1999] 4 C.T.C. 210 (B.C.S.C.); cf. *Discovery Trust Co. v. Abbott* (1982), 38 B.C.L.R. 55 (S.C.). These cases often talk about the trust nature of the RRSP and cite *Re McMahon* (1979), 108 D.L.R. (3d) 71 (B.C.C.A.). Some Saskatchewan cases go so far as to hold that no debt arises, even when the debtor has collapsed the RRSP and asked for payment, until payment is actually received. See *Creative Touch*, (*ibid.*); *Delaire v. Delaire*, *supra* note 58; *Evenson v. Evenson* (1996), 142 Sask. R. 166 (Q.B.) (dicta).
A minority of cases say the RRSP is garnishable. See *Gero v. Minister of National Revenue*, [1980] 1 F.C. 69 (T.D.); *Bateman v. TD Bank* (1991), 64 B.C.L.R. (2d) 27 (S.C.) (dicta).
There is little authority on whether an RRSP is garnishable once a payment or payments have been agreed on, although cf. *Canada v. Waldteufel*, [1995] A.C.F. No. 307 (F.C.T.D.).
See also Dunlop, *Creditor-Debtor Law in Canada*, *supra* note 23 at 384; Norwood, *supra* note 58, cc. 9 and 11; Robinson, *supra* note 58 at 4.129–4.136; Springman and Gertner, *supra* note 58 at 29-30, 45-52; and articles by Biro, *supra* note 58; S.W. Bowman, "Third Party Demands - Application to RRSP - measure of damages" (1988) 36 Can. Tax J. 1514 [case comment on *DeConinck v. Royal Trust Corp. of Canada*]; Law, *supra* note 58; McCabe, *supra* note 52; McKee, *supra* note 71; Shawn McReynolds, "Sheltering RRSP Assets from Creditors at Death" (1984) 6 E. & T.Q. 106; Taylor, *supra* note 58; and Williamson, *supra* note 52.

remain uncertain until the Alberta courts have an opportunity to flesh out the legislative framework.

[46] Matters become clearer when the depositor elects to purchase an annuity or a RRIF with the proceeds of the RRSP. Now there is an obligation to pay, which can be attached as a series of future obligations under a continuing garnishment. Assuming that there is no express exemption and assuming that the agreement does not provide otherwise,[75] the garnishee summons, issued under the Alberta Rules of Court and served on the depository, should catch present and future money obligations for the period of time set out in s. 79 until certain terminating events set out in s. 79 occur, or unless the summons is renewed.[76]

[47] We assume that a similar analysis applies to DPSPs, although there are very few cases.

4. Equitable execution

[48] Equitable execution includes receivership and other remedies developed by the court of equity to enforce that court's decrees and to supplement the limited remedies available at common law.[77] Immediately before the enactment of the *Civil Enforcement Act*, most cases restricted equitable execution to situations where the debtor's property was exigible or garnishable, unless there were special circumstances justifying the more expensive and complex equitable remedy.[78] A few cases, including some in Alberta, used the special circumstances formula to

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[75] Exemptions are discussed later in this chapter.

[76] Although see the line of Saskatchewan cases which hold that no garnishable debt arises, even when the debtor has collapsed the RRSP and asked for payment, until payment is actually received. See *Creative Touch*, *supra* note 74; *Delaire v. Delaire*, *supra* note 58; *Evenson v. Evenson*, *supra* note 74.

[77] Dunlop, *Creditor-Debtor Law in Canada*, *supra* note 23, c. 12. See also Richard H. Bowes, "Receivers and Special Remedies" in Legal Education Society of Alberta, *Civil Enforcement Act* (Continuing Professional Competence Seminar, Legal Education Society of Alberta, 9 April 1996); Robinson, *supra* note 58, c. 9.

[78] *Fox v. Peterson Livestock Ltd.* (1982), 17 Alta. L.R. (2d) 311 (C.A.).

justify a more generous use of the remedy, including the grant of equitable execution against assets expressly declared to be exempt by statute.[79]

[49] Equitable execution against exempt assets appears not to be available under the *Civil Enforcement Act*. Section 85(1) provides in part that "where certain *exigible* property of an enforcement debtor cannot otherwise be conveniently realized, the Court [may grant equitable execution]."[80] "Exigible" is defined as follows:

> 1(1)(u) 'exigible' means, with respect to property, not exempt from writ proceedings or distress proceedings.

The case law on s. 85 appears to support the view that equitable execution, at least under the *Civil Enforcement Act*, cannot be used against exempt property.[81] A receivership order under s. 13 of the *Judicature Act*[82] is not literally caught by the restrictive wording of s. 85 of the *Civil Enforcement Act*, although Perras J. in *A. (K.L.) v. S. (R.C.)* concludes that some at least of the rules governing the grant of receivership orders under the *Judicature Act* have been "supplanted" by the criteria set out in ss. 85 and 86 of the *Civil Enforcement Act*.[83]

5. The exemption of insurance RRSPs and similar plans

[50] Numerous Alberta and federal statutes provide that certain types of property or income will be exempt from creditors' remedies. This report noted earlier how pensions and insurance RRSPs, DPSPs and RRIFs are usually exempt from enforcement and garnishment, while non-insurance RRSPs, DPSPs and RRIFs are exigible and garnishable. This section will say more about the exemption sections in the *Insurance Act* which affect retirement savings plans.

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[79] *Simon v. Simon* (1984), 45 O.R. (2d) 534 (S.C.); *Lavigne v. Robern* (1986), 56 O.R. (2d) 385 (H.C.); *Toronto Dominion Bank v. Berezowsky* (1987), 49 Alta. L.R. (2d) 337 (Q.B.) [*Berezowsky*]; *R. v. R.* (1995), 28 Alta. L.R. (3d) 230 (Q.B.); cf. *A and W*, *supra* note 58; but see *Pandit v. Ruhman* (1987), 49 Alta. L.R. (2d) 367 (Master); *Re Burke* (1988), 72 C.B.R. (N.S.) 255 (Alta. Q.B.); *K.(C.M.) v. Young* (1996), 12 C.C.P.B. 164 (B.C.S.C.).

[80] Emphasis added.

[81] *A. (K.L.) v. S. (R.C.)* (1997), 55 Alta. L.R. (3d) 24; 211 A.R. 61 (*sub nom. Allen v. Shaw*) (Q.B.); cf. *Fruh v. Muir* (1998), 229 A.R. 375 (Q.B.).

[82] R.S.A. 2000, c. J-2.

[83] *A. (K.L.) v. S. (R.C.)*, *supra* note 81.

[51] Exemptions of life insurance have been traced back to the early nineteenth century and are common in *Insurance Acts* today.[54] The idea was originally to protect the widow and children of the deceased wage-earner, but the exemption provisions were soon extended to exempt the cash surrender value of policies, and to cover beneficiaries other than widows and children. The exemption of life insurance policies, annuities and other life insurance products is not an issue in this report, unless those products take the form of RRSPs, DPSPs and RRIFs.

[52] In addition to the life insurance policies, insurance companies have at least since Confederation sold annuities.[55] Whether annuities are fairly described as life insurance is a difficult issue, depending on the precise terms of the contract.[56] After the *Income Tax Act* was amended to give tax deferral status to RRSPs and similar plans, the insurance industry started to market such plans. Insurer and non-insurer vendors of retirement plans have tried to copy each other's products with the result that the insurance connection has become increasingly tenuous.[57]

[53] When the courts held that annuities sold by insurance companies were not life insurance,[58] the *Uniform Life Insurance Act*, followed by all common law provinces, amended the definition of life insurance to include annuities or agreements to enter into annuities. In 1981, the Alberta *Insurance Act*[59] was amended to provide that the term "life insurance" includes "an undertaking to provide an annuity, or what would be an annuity except that the periodic payments may be unequal in amount, for a term dependent solely or partly on a human life,

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[54] Dunlop, *Creditor-Debtor Law in Canada*, *supra* note 23 at 495-496.

[55] The history is described in *Re Coopérants*, *supra* note 33.

[56] Marvin G. Baer and James A. Rendall, *Cases on the Canadian Law of Insurance*, 6th. ed. (Scarborough, Ont.: Carswell, 2000) at 30-63; Edward A.J.Rothberg, "Life Insurance and Creditor Protection: Review and Update, 2000" (2000) 19 E.T.P.J. 269.

[57] Rothberg, *ibid.* at 285-286.

[58] *Gray v. Kerslake*, [1958] S.C.R. 3, (1957), 11 D.L.R. (2d) 225.

[59] R.S.A. 1980, c. I-5.

and such an undertaking shall be deemed always to have been life insurance."[90] The current *Insurance Act*[91] sections are reproduced below. After some early uncertainty, recent court decisions have read this extended definition generously in cases where exemptions from creditors were at issue.[92] The effect of the amendments is to extend the exemptions of life insurance to annuities, RRSPs and RRIFs if they name the proper beneficiary and otherwise fit within the sections.

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[90] S.A. 1981, c. 49, amending s. 1(m.1) and adding s. 240.1 of the Act. On the amendment in 1981, see McCabe, *supra* note 52 at 227-228.

[91] *Insurance Act*, *supra* note 2, s. 555.

[92] A substantial group of cases interpret the amended definition of "life insurance" to include RRSPs. See e.g., *Re Larocque* (1982), 38 O.R. (2d) 385 (S.C.); *China Software Corp. v. Leimbigler* (1990), 45 C.P.C. (2d) 41, 4 C.B.R. (3d) 185 (B.C.S.C.); *Lofts v. Lofts*, [1991] 2 W.W.R. 586 (Sask. Q.B.); *C.I.B.C. v. Meltzer*, *supra* note 58; *Royal Bank v. Oliver* (1992), 11 C.B.R. (3d) 82 (Sask. Q.B.); *Re Rogers*, *supra* note 59; *M.N.R. v. Anthony* (1995), 124 D.L.R. (4th) 575 (Nfld. C.A.); *Christensen (Trustee of) v. Christensen* (1996), 39 Alta. L.R. (3d) 371 (C.A.), leave to appeal to S.C.C. refused, [1996] S.C.C.A. No. 394; *Re Sykes* (1998), 156 D.L.R. (4th) 105 (B.C.C.A.); *B.C. Enterprise Corp. v. Springall* (1999), 12 C.C.L.I. (3d) 203 (B.C.S.C.); *Bank of Montreal v. Mercer* (2001), 197 Nfld. & P.E.I.R. 290 (Nfld. S.C.). For a similarly expansive approach, see *Royal Bank*, *supra* note 16, and *Re Coopérants*, *supra* note 33. Compare *Re Neuls*, *supra* note 59 (a case before the amendment of the *Insurance Act*, *supra* note 2).
Some bankruptcy cases find the RRSP to be exempt but grant the bankrupt a conditional discharge. See e.g., *Re Larocque*, (*ibid.*); and *Re Rogers*, *supra* note 59.
The exemption does not apply where the RRSP agreement does not contain an undertaking by the depository to provide an annuity. See *Dellelce*, *supra* note 58. Nor would s. 580(2) apply to an RRSP which does not name as beneficiary one of the family members listed in the subsection.
Some earlier cases concluded that the equivalent of s. 580(2) of the Alberta *Insurance Act*, (*ibid.*) exempts obligations to pay from an insurance annuity or RRIF to the beneficiary but not to the annuitant. See *Bank of Montreal v. Arrowsmith* (1984), 7 C.C.L.I. 256 (N.S.T.D.); *Bank of Montreal v. Freedman* (1984), 58 B.C.L.R. 289 (S.C.); *Crosson v. Crosson* (1985), 14 C.C.L.I. 246 (B.C.S.C.); *Berezowsky*, *supra* note 79. These cases were not followed and the section, interpreted literally, was applied to obligations to pay the annuitant as well as the beneficiary in *Whalley v. Harris Steel Ltd.* (1997), 46 C.C.L.I. (2d) 250, 17 C.C.P.B. 1 (Ont. C.A.); followed in *Bank of Montreal v. Mercer*, (*ibid.*).
See also Dunlop, *Creditor-Debtor Law in Canada*, *supra* note 23 at 495-500; Houlden and Morawetz, *supra* note 58 at 316-318; Norwood, *supra* note 58, cc. 9 and 11; Robinson, *supra* note 58, cc. 4 (garnishment), 5 (execution against personal property) and 9 (equitable execution); Springman and Gertner, *supra* note 58; and articles by McCabe, *supra* note 52, McKee, *supra* note 71; Colin H.H. McNairn, "Investments in Segregated Funds: Their Protection from Creditors" (1996) 27 Can. Bus. L.J. 161; Rothberg, *supra* note 86; and Glenn Stephens, "Update on Creditor Protection" (1998) 18 E.T.P.J. 119.

[54] RRSPs and similar plans sold by insurance companies are governed by ss. 554, 555, 575 and 580 of the *Insurance Act*:[93]

> 554 In this Subpart,
>
> (b) "beneficiary" means a person, other than the insured or the insured's personal representative, to whom or for whose benefit insurance money is made payable in a contract or by a declaration;
>
> Annuity deemed life insurance
>
> 555 For the purposes of this Subpart, an undertaking entered into by an insurer to provide an annuity, or what would be an annuity except that the periodic payments may be unequal in amount, is deemed to be and always to have been life insurance whether the annuity is for
>
> (a) a term certain,
>
> (b) a term dependent either solely or partly on a human life, or
>
> (c) a term dependent solely or partly on the happening of an event not related to a human life.
>
> Irrevocable designation
>
> 575(1) An insured may in a contract or by a declaration, other than a declaration that is part of a will, filed with the insurer at its head or principal office in Canada during the lifetime of the person whose life is insured designate a beneficiary irrevocably, and in that event the insured, while the beneficiary is living, must not alter or revoke the designation without the consent of the beneficiary and the insurance money is not subject to the control of the insured or of the insured's creditors and does not form part of the insured's estate.
>
> (2) When the insured purports to designate a beneficiary irrevocably in a will or in a declaration that is not filed as provided in subsection (1), the designation has the same effect as if the insured had not purported to make it irrevocable.
>
> Insurance money not part of estate
>
> 580(1) When a beneficiary is designated, the insurance money, from the time of the happening of the event on which the insurance money becomes payable, is not part of the estate of the insured and is not subject to the claims of the creditors of the insured.
>
> (2) While a designation in favour of a spouse or adult interdependent partner, child, grandchild or parent, or any of them, of a person whose life is insured is in effect, the insurance money and the rights and interests of the insured in the insurance money and in the contract are exempt from writ proceedings.

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[93] *Supra* note 2. Ss. 574, and 576 to 579, which also deal with exemptions and other matters, are less significant to this discussion.

[55] Both ss. 575 and 580(1) make it clear that the "insurance money," including the proceeds of RRSPs and similar plans,[94] does not form part of the insured's estate. The proceeds from a life insurance RRSP or similar plan pass directly to the beneficiary of the plan, and are not subject to claims by the creditors of the estate, at least in the administration of the estate.[95] Sections 575 and 580(1) are not exemption sections like s. 580(2); their only effect is to take RRSPs and similar plans out of the estate of the depositor and therefore out of the grasp of the estate creditors. It is also significant that ss. 575 and 580(1) protect all designated beneficiaries, not just the family beneficiaries listed in s. 580(2).[96] Because of the definition of "beneficiary" in s. 554(b), ss. 575 and 580(1) are not likely to apply to a designation of the insured's estate or personal representative.[97]

[56] Section 580(2) does a different job than s. 580(1). Where a designation in favour of one or more of the listed family members is in effect, s. 580(2) creates an exemption of "the insurance money and the rights and interests of the insured in the insurance money and in the contract" from writ proceedings. Section 580(2) has a significant role while the depositor is alive; its relevance after the depositor's death is less clear.

[57] The appropriate exemption of RRSPs, DPSPs and RRIFs from claims of the dead depositors' creditors will be discussed in a separate report.

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[94] S. 555. For an RRSP to fit within s. 555, it must contain "an undertaking entered into by an insurer to provide an annuity, or what would be an annuity except that the periodic payments may be unequal in amount." See Cy M. Fien, "*Waugh Estate v. Waugh*: More About the Nature of RRSPs" (1990-91) 10 E. & T.J. 37 at 43-46.

[95] *Clark Estate v. Clark*, [1997] 3 W.W.R. 62, 15 E.T.R. (2d) 113 (Man. C.A.); *Fekete Estate v. Simon* (2000), 32 E.T.R. (2d) 202 (Ont. S.C.); see also *Olsen v. Olsen Estate* (1990), 30 R.F.L. (3d) 447 (Sask. Q.B.). See articles by McReynolds, *supra* note 74 at 107-109; Fien, *ibid.* at 43-46; McKee, *supra* note 71 at 250, 257-258; McNairn, *supra* note 92 at 173-174. Compare *Re Brown Estate* [1993] 2 W.W.R. 513 (Sask. Q.B.); commented on in David Norwood, "The Life Insurance Family Beneficiary" (1994) 13 E. & T.J. 256 at 262.

[96] McKee, *ibid.* at 250, 257-258; McNairn, *ibid.* at 173-174.

[97] McKee, *ibid.* at 258; McNairn, *ibid.* at 173-174.

D. Exemptions of RRSPs, DPSPs and RRIFs in Other Canadian Common Law Jurisdictions

[58] Most Canadian common law jurisdictions are similar to Alberta in exempting only insurance RRSPs and similar plans, but some provinces have extended exemptions to non-insurance products.[58] These exemptions are discussed briefly below.

1. Saskatchewan

[59] Saskatchewan is the only jurisdiction which has passed a version of the *ULCC Uniform Bill*. On May 29, 2002, the Saskatchewan Legislature passed *An Act exempting Registered Retirement Plans from certain Enforcement Processes* [hereinafter the *Registered Retirement Plans Exemption Act*].[59] The Act, which came into force on March 4, 2003, exempts registered retirement savings plans, deferred profit-sharing plans, and registered retirement income funds from creditors' remedies in whole or in part.[60]

[60] Before the passage of the *Registered Retirement Plans Exemption Act*, Saskatchewan had limited exemptions against RRSPs in two statutes. The *Saskatchewan Insurance Act*[61] contained exemption provisions similar to those in Alberta which extended to annuities, RRSPs and RRIFs if the contracts named the proper beneficiary and otherwise fit within the sections. Section 9 of the Saskatchewan *Exemptions Act*[62] exempted the "property and interest of an annuitant in an annuity or of a person interested in or entitled to a contract for an annuity under the *Government Annuities Act* (Canada), and any moneys payable or paid under a contract for an annuity." The section has been held to exempt

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[58] McKee, *ibid.* at 256.

[59] *Supra* note 8. The Act is reproduced in Appendix C.

[60] See Dunlop, "Should Creditors'," *supra* note 7.

[61] R.S.S. 1978, c. S-26.

[62] R.S.S. 1978, c. E-14.

RRSPs.[103] It is not clear to what extent these exempting provisions have been repealed or amended by the *Registered Retirement Plans Exemption Act*.

[61] Saskatchewan law has been radically altered by the passage of the *Registered Retirement Plans Exemption Act*.[104] Section 3(1) of the Act provides that "all rights, property and interests of a planholder in a registered plan are exempt from any enforcement process" A registered plan is defined in s. 2 to mean "a DPSP, an RRIF or an RRSP"; the three protected plans are in turn defined by reference to specified sections of the *Income Tax Act*.[105] "Enforcement process" is defined in s. 2 to mean "attachment, garnishment, execution, seizure or other legal process for the enforcement of a debt."[106] Section 3(1) applies notwithstanding other Acts or regulations, but does not apply to the enforcement of a maintenance order.[107]

[62] The Act follows the *ULCC Uniform Bill* by preserving the right to attach money obligations owing from RRSPs, DPSPs and RRIFs to the depositor-debtor. The central parts of ss. 4 and 5 raise problems and need to be quoted in full.

> **Payments out of registered plans**
>
> 4(1) Subject to section 5 but notwithstanding any other Act or law, a payment out of a registered plan to a planholder or the legal representative of a planholder is not exempt from any enforcement process.
>
> *[4(2) and (3) provide that a transfer of property held in one registered plan to another registered plan is not a payment for the purposes of s. 4(1), nor is it a fraudulent or preferential transfer under The Fraudulent Preferences Act.]*
>
> **Enforcement against payments out**
>
> 5. For the purposes of enforcing a creditor's rights against payments out of a registered plan to a debtor planholder:

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[103] *Churchill (Trustee of)* v. *Churchill* (1993), 17 C.B.R. (3d) 222 (Sask. Q.B.); *Royal Bank of Canada* v. *Miller* (1993), 19 C.B.R. (3d) 208, aff'd [1994] S.J. No. 122 (C.A.).

[104] *Supra* note 8. On the Act, see Dunlop, "Should Creditors?," *supra* note 7.

[105] *Supra* note 6.

[106] Equitable execution is arguably not a "legal process" and therefore not caught by the Saskatchewan exemption. See Dunlop, "Should Creditors?," *supra* note 7 at 295-297.

[107] *Registered Retirement Plans Exemption Act*, *supra* note 8, s. 3(2), (3).

> (a) the amount of a payment out of the registered plan is deemed to be a debt due or accruing due to the person for or with respect to the person's wages or salary within the meaning of *The Attachment of Debts Act*; and
>
> (b) the exemptions set out in section 22 of *The Attachment of Debts Act* apply, with any necessary modification.

[63] Section 5(a) is apparently intended to accomplish at least two objectives. First, it tidies up an earlier confusion in Saskatchewan law by making it clear that a money obligation payable from a plan to the depositor debtor is a debt due or accruing due.[108] Secondly, the subsection seeks to assimilate garnishment of such an obligation to the garnishment of wages. The second objective is carried forward in s. 5(b) which provides that "the exemptions set out in s. 22 of *The Attachment of Debts Act* apply, with any necessary modification."

[64] The intention of the drafter of ss. 4 and 5 appears to have been that an obligation of a depository to pay money out of an RRSP or RRIF should be regarded as a debt due or accruing due and should be subject to the exemptions applied to wages or salaries. The use of the word "payments" raises the question whether the sections apply to debts due or accruing due but not paid, or whether "payments" means money actually paid, in which case the sections do not apply to the garnishment of a debt due or accruing due from the depository but only to the seizure of the money or cheque once received.[109]

[65] There are other problems in ss. 4 and 5. A depository manager might well be puzzled about how much money to pay into court under s. 5(b). What "necessary modifications" is the manager to make to s. 22 of the *Attachment of Debts Act*?[110] Whether the Act as a whole applies as against equitable execution is also an issue.[111] These are issues of detail (although significant). The basic idea in ss. 4

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[108] See cases cited in Dunlop, "Should Creditors?," *supra* note 7 at 283-284.

[109] See *ibid.* at 293-295.

[110] R.S.S. 1978, c. A-32.

[111] S. 2 of the Act defines "enforcement process" as meaning "attachment, garnishment, execution, seizure or other legal process for the enforcement of a debt." Equitable execution is arguably not a "legal process," leading to the odd conclusion that whether the exemptions apply depends on the

(continued...)

and 5 is that exemptions of RRSPs and the like from garnishment are more limited than exemptions against execution.

2. Other Canadian jurisdictions

[66] The Prince Edward Island *Designation of Beneficiaries under Benefit Plans Act*[112] creates an exemption of a 'plan' which is defined to include "a retirement savings plan, home ownership savings plan and a retirement income fund as defined in the *Income Tax Act* (Canada)." The exemption is similar to the *Insurance Act* exemption sections.

[67] The British Columbia *Law and Equity Act*[113] deals with RRSPs and RRIFs which are outside the scope of the *Insurance Act*. Money payable from such plans is, after the death of the annuitant, enforceable by the beneficiary, and "the benefit is not part of the estate of the annuitant."[114] The sections do not expressly create an exemption of such plans or the obligations to pay out of them.

[68] The Quebec *Trust Companies and Savings Companies Act* provides that "moneys constituting fixed-term annuities are unseizable in the hands of the trust company as fixed-term annuities transacted by insurers."[115] There is substantial case law on the section.[116]

[69] The Manitoba Law Reform Commission proposed in 1990 that the *Retirement Plans Beneficiaries Act*[117] be amended to provide that benefits payable

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[111] (...continued)
remedy the execution creditor chooses to deploy. See Dunlop, "Should Creditors?," *supra* note 7.

[112] R.S.P.E.I. 1988, c. D-9, ss. 1, 9 and 10.

[113] *Law and Equity Act*, R.S.B.C. 1996, c. 253, ss. 49-51.

[114] *Ibid.*, s. 49(2)(c).

[115] Quebec *Trust Companies and Savings Companies Act*, R.S.Q., c. S-29.01, s. 178.

[116] See e.g., *Canada (M.N.R.) v. Crevier*, [1993] F.C.J. No. 709 (T.D.); *R.W. v. C.H.*, [1994] Q.J. No. 1202 (S.C.); *Banque de Nouvelle-Ecosse c. Thibault*, [2001] J.Q. No. 3815 (C.A.).

[117] C.C.S.M. 1992, c. R138.

to a beneficiary under plans like RRSPs and RRIFs should not become part of the estate of the depositor, and should not be subject to claims of the creditors of the depositor. The Commission further proposed that, while a family designation is in effect, the assets of the plan and the rights and interests of the depositor be exempt from execution or seizure.[118] Neither recommendation has yet been accepted.

E. The Law in Other Countries

[70] The problems with striking a balance between the competing policies of encouraging people to save for retirement and permitting creditors to satisfy their claims against debtors are not unique to Alberta, or even to Canada. The same issues have been the subject of litigation and legislation in the United States and other Commonwealth jurisdictions such as Great Britain and Australia.

[71] There are difficulties with directly comparing the approaches taken in other jurisdictions as the types of retirement savings mechanisms tend to differ from those used in Canada. However, though the forms and specifics of retirement plans differ in other jurisdictions, overall it appears that the practice of saving for retirement is greatly encouraged, even when it causes hardship to creditors.

1. United States

[72] The United States has faced the precise dilemma which is addressed herein, that is whether creditors should be permitted to realize against a debtor's retirement savings funds.[119]

[73] There are several different types of retirement savings plans available in the United States. One form of plan is referred to as a "401(k) plan" (referring to the section of the U.S. *Income Tax Act* governing the plan), which is offered through employers. "Keogh" plans may be used by self-employed individuals. People may also save for their retirement using "Individual Retirement Accounts" ("IRAs") which are afforded special tax treatment.

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[118] Manitoba Law Reform Commission, *Statutory Designations and the Retirement Plan Beneficiaries Act* (Winnipeg: The Commission, 1990) at 16-17.

[119] See Sabino, A.M. & Clarke, J.P., "The Last Line of Defense: The New Test for Protecting Retirement Plans from Creditors in Bankruptcy Cases" (1997) 48 Ala. L. Rev. 613.

[74] Exemptions to which a debtor is entitled may be found in both federal and state legislation. As in Canada where exemptions differ from jurisdiction to jurisdiction, so do exemptions in the United States, particularly in the treatment of retirement savings plans.

[75] The federal *Employee Retirement Income Security Act (1974)* (ERISA) protects certain employee-based retirement savings plans from creditors, in particular, 401(k) plans and certain qualified profit-sharing plans.[120] Plans which qualify under ERISA are protected from both judgment creditors and creditors in bankruptcy. The U.S. *Bankruptcy Code*[121] provides a list of exemptions in bankruptcy, but permits states to opt out of the *Code* and impose their own exemptions. Thirty five states have opted out of the federal bankruptcy exemptions and have provided their own legislated exemptions.[122]

[76] State creditor protection laws vary greatly. Some states do not provide any protection for retirement savings funds. Twenty six states exempt all individual retirement accounts, usually by imposing some form of "spendthrift trust". Eighteen states and the District of Columbia allow the court to determine a reasonable exemption to support the debtor and dependents.[123] Other states provide limited protection and provide for certain clawbacks, or permit the court to exercise discretion in determining an appropriate exemption.[124]

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[120] Winke, D.P., "Are Your Retirement Assets Protected from Creditors," online: Horizon Financial Planning Corp. <http://winke.com/hfpc/hfpc/retascr.htm>.

[121] 11 U.S.C. tit. 11.

[122] Ray, J.C., "Protecting Pension Assets in Personal Bankruptcy" (1994) 68 St. John's L. Rev. 409 at 411.

[123] *Ibid.*

[124] For example, in Michigan retirement accounts and individual retirement annuities are exempt from the bankrupt's estate, although any amounts contributed to the fund within 120 days before the debtor files for bankruptcy will not be protected; see Harter, P., "Seizure of Property by a Creditor – What Property is Exempt in Michigan?", online: <http://courts.co.calhoun.mi.us/quest053.htm>. In California the exemption may be defeated if the creditor can demonstrate that the plan is not being legitimately used for retirement purposes; see Landau, J.B., "Bankruptcy and Enforcement of Judgments: Protecting Retirement Assets" (1998) 19 Cal. Law. 30.

[77] Prior to the U.S. Supreme Court's 1992 decision in *Patterson* v. *Shumate*,[125] the law was divided as to whether an ERISA-qualified retirement savings plan was exempt from the bankrupt's estate under the U.S. *Bankruptcy Code*. The *Bankruptcy Code* provided the following exclusion from the definition of "property of the estate" in s. 541(c)(2):

> A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

[78] The U.S. Supreme Court held that this provision encompassed any relevant non-bankruptcy law, regardless of whether it was state law or federal law, including ERISA. Thus, retirement savings plans which complied with ERISA would be exempt from the reach of creditors in bankruptcy.[126]

[79] There are three interesting aspects of the *Patterson* decision:

(i) the Court stressed the importance of treating retirement plans in bankruptcy in the same manner as they would be in a normal judgment situation. The Court stated that this is necessary to prevent[127]

> ... a party from receiving 'a windfall merely by reason of the happenstance of bankruptcy,'" quoting Lewis v. Manufacturers National Bank, 364 U.S. 603, 609. ... Declining to recognize any exceptions to that provision within the bankruptcy context minimizes the possibility that creditors will engage in strategic manipulation of the bankruptcy laws in order to gain access to otherwise inaccessible funds.

(ii) the Court specifically recognized that in balancing the interests of creditors and the need to save for retirement, Congress placed greater emphasis on the need to save for retirement;[128] and

(iii) the Court noted that its decision furthered "another important policy underlying ERISA: uniform national treatment of pension benefits. Construing 'applicable non-bankruptcy law' to include federal law ensures

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[125] 504 U.S. 753 (1992) [*Patterson*].

[126] Since *Patterson*, *ibid.* the cases have been divided as to whether plans must both be ERISA-qualified as well as have specific tax aspects, see Ray, *supra* note 122.

[127] *Patterson*, *ibid.* at 764.

[128] *Ibid.* at 765.

> that the security of a debtor's pension benefits will be governed by ERISA, not left to the vagaries of state spendthrift trust law."[129]

[80] The decision in *Patterson* was limited to ERISA-qualified retirement plans and does not apply to IRAs or other types of plans. State exemption laws govern the exigibility of IRAs and other non-ERISA qualified retirement plans.

[81] A potential consideration raised earlier is whether a debtor's ability to access funds for personal use prior to retirement should affect the exigibility of the retirement fund. This argument was rejected in *In re Meehan*.[130] This case deals with a non-ERISA qualified retirement plan in Georgia. The court held that

> the district court perceived an inequity in allowing debtors to shield IRA funds from creditors notwithstanding the debtors' ability to withdraw the corpus for personal use. In addition to the district court, bankruptcy courts have relied on this factor. Although we recognize the force of the trustee's argument, we conclude that the case law indicates otherwise. ... In light of the foregoing precedent, and in light of the congressional concern about protecting pension benefits as recognized by the Supreme Court in *Shumate*, we conclude that debtor Meehan's potential access to the IRA funds is not sufficient to deprive her of the .... exclusion.

2. Australia

[82] The Australian government takes the position that saving for retirement is of the utmost importance, and has implemented a mandatory superannuation plan for everyone who is employed. There are three key elements to the "superannuation guarantee":[131]

(i) workers contribute a set percentage of their income through their employer into private savings (as of 2002 this amount is 9% of their income) into a superannuation plan of their choice. The mandatory savings can be augmented by tax-favoured voluntary contributions;

(ii) upon retirement, workers will have accumulated a large nest egg; and

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[129] *Ibid.* at 766.

[130] 102 F. 3d 1209 (11th Cir. 1997).

[131] These elements and the following discussion of Australia's superannuation system are drawn from Mitchell, D.J. & O'Quinn, R.P., "Australia's Privatized Retirement System: Lessons for the United States" (8 December 1997) The Heritage Foundation Backgrounder, No. 1149.

(iii) a safety-net program guarantees that all retirees will receive an income that at a minimum matches the income they would have received under the former government-run program.

[83] Savings in superannuation funds are fully vested and portable between employers. They are locked in and must be preserved until the contributor reaches age 55. Early hardship withdrawals are virtually prohibited, as the circumstances under which they are permitted are very narrow and the guidelines are interpreted strictly.

[84] Superannuation funds are generally not exigible in bankruptcy, with the exception of spousal and child support orders.

3. United Kingdom

[85] The United Kingdom has implemented different programs to encourage and assist people with saving for retirement. This is done through creditor protection of retirement assets and tax relief.[132]

[86] Almost all private pension schemes contain non-assignment provisions as a result of the *Income and Corporation Taxes Act 1988*, s. 590, which requires such provisions in order for a plan to qualify for tax relief. Many private pension schemes also contain rules which provide for the forfeiture of benefits should they become payable to creditors.[133]

[87] There are several limitations on the debtor's ability to assign benefits from certain pension plans. The *Social Security Pensions Act 1975*, s. 48(3) provides that a debtor's guaranteed minimum pension ("GMP") shall not pass on bankruptcy to any trustee or person acting on behalf of the bankrupt's creditors. The legislation does not go so far as to protect any amounts in excess of the GMP, although such amounts would likely be subject to the rules of the scheme, and the

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[132] United Kingdom Inland Revenue "Personal Pension Schemes" August 2001, online: <http://www.inlandrevenue.gov.uk/pensionschemes/> [U.K. Inland Revenue].

[133] Tennet, M. & Newman, P., "Enforcing Judgments Against Pension Rights" (Part I) (1993) 137 Sol. J. 424, (Part II) (1993) 137 Sol. J. 458.

trustee is in no better position than the debtor in its ability to access funds from the scheme.

[88] Another problem with executing against pension plans is that many contain forfeiture clauses which are triggered by certain events such as bankruptcy or attempts by the contributor to alienate or charge any portion of the benefits. In such cases the benefits usually become part of a discretionary trust which is payable only to the debtor, and benefits will only be paid on the condition that they are not assigned after payment.[134]

[89] Private tax-assisted retirement savings plans in the United Kingdom have undergone significant changes in the past few years. In May of 2001 previous forms of retirement savings plans such as TESSAs and Individual Savings Accounts (ISAs) were replaced with a new form of retirement savings plans called personal pensions. Retirement savings plans which existed prior to the personal pension schemes are still valid but no new plans may be set up after May 1, 2001. Personal pensions may be set up through an employer or may be done privately. They are offered by many different institutions, including banks, building societies, life assurance companies, unit trusts and other similar bodies. The personal pension schemes are similar to Canadian RRSPs in that they are tax-assisted retirement savings accounts. A major difference is that these funds are locked in and may not (subject to limited exceptions) be accessed until at least age 50. The exceptions include death of the contributor prior to age 50, or severe disability of the contributor.

[90] The tax relief that applies to these schemes includes:

(i) tax relief on payments made into a personal pension scheme;

(ii) the recipient is not taxed on any contributions made by an employer into the scheme;

(iii) the employer is entitled to tax relief on the income contributions made into the scheme;

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[134] *Ibid.*

(iv) the scheme does not pay tax on investments and income gained while funds are invested on behalf of the contributor; and

(v) some of the benefits from the scheme may be received free of tax.

[91] The maximum amount which may be paid into a personal pension scheme every year is a percentage of the contributor's income which increases on a sliding scale. A scheme must be approved by Inland Revenue and operated in accordance with certain guidelines.

[92] As the personal pension funds are intended to provide the contributor with benefits upon retirement they cannot be accessed before the contributor reaches age 50. Even then, the fund must be paid out mainly in the form of pension benefits (you may take 25% as a tax-free lump sum). The contributor cannot withdraw the money in the same way as a savings account, even if the contributor is prepared to pay back the tax relief given on contributions.[135]

[93] As to the exigibility of personal pensions, in the United Kingdom a creditor has no greater rights than a debtor in the debtor's assets. Thus, the fact that a contributor has a very limited right to receive any payments from the plan until reaching the age of retirement would likely hinder a creditor from executing against a plan.

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[135] U.K. Inland Revenue, *supra* note 132.

CHAPTER 3. BASIC POLICY

A. The Basic Issues and Our Conclusions

[94] There are two fundamental issues at the root of this project. The first is whether insurance and non-insurance RRSPs, DPSPs and RRIFs should enjoy any exemption from the remedies of creditors. The second and more difficult question assumes that some exemption is appropriate and asks (1) if the law should provide total protection of the future income plan and obligations to pay out of the plan, or (2) whether and how the exemption should be limited?

[95] In our view, insurance and non-insurance RRSPs, DPSPs and RRIFs[136] should be exempt from creditors' remedies. No distinction should be drawn among remedies nor should the exemption be different between insurance and non-insurance products. Put simply, these assets, like pensions, are so similar and so essential to the survival of individuals that they should be completely protected from creditors. Our reasons follow.

B. RRSPs, DPSPs and RRIFs Should be Completely Exempt

1. Canadian law encourages retirement saving

[96] We concluded in chapter 2 that people will probably need to take more responsibility for saving for their retirement. People live longer,[137] while government pensions, medicare and other benefits for the retired are tending to lag behind inflation. The trend since 1990 has been towards fewer pensionable jobs as a percent of the total available,[138] and people are increasingly forced to provide for themselves while working. A 2003 survey sponsored by Investors Group and conducted by Decima Research indicates that it may be unrealistic for people to assume that they will be able to supplement their savings by working after

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[136] As defined in the *Income Tax Act*, *supra* note 6. See below Recommendation 2.

[137] The implications of increases in longevity are explored in Doug Andrews, "Policy Implications of Aging for Canadian Health Care and Retirement Programs" (Paper presented at the Retirement Implications of Demographic and Family Change Symposium, June 2002) [unpublished].

[138] "In 1999, 40% of the labour force put money into an RRSP, up from 32% at the start of the decade. In contrast, just one-third of the labour force contributed to a Registered Pension Plan in 1999, compared with 37% in 1991." See Stats. Can., *Canada's Retirement Income Programs*, *supra* note 27.

retirement.[139] A recent Statistics Canada study argues that many Canadians have not saved enough to provide an adequate income during retirement.[140]

[97] Successive governments have been concerned with the plight of retired people, and have provided modest public assistance and insurance plans for retirees, such as Old Age Security, the Canada Pension Plan, and other pension, insurance and welfare programs. The same governments have also encouraged people to save for retirement and to rely on their own resources instead of the public purse. The *Income Tax Act* grants generous tax exemptions to people who participate in pensions, RRSPs, DPSPs and RRIFs. Provincial governments have created elaborate minimum pension standards legislation to ensure that retirement savings in pension plans are as safe as possible. Most pensions statutes exempt pensions entirely from execution and garnishment.[141] Several provinces allow more extended exemptions for annuities,[142] and Saskatchewan has passed a statute, following with some modifications the *ULCC Uniform Bill*,[143] exempting all RRSPs, DPSPs and RRIFs.[144] RRSPs and RRIFs sold by insurance companies are completely exempt from creditors' remedies under insurance legislation.[145]

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[139] Investors Group Media Release, *supra* note 28; Investors Group News Release, *supra* note 29.

[140] Stats. Can., *Assets and Debts*, *supra* note 26. An American study makes the point that women are less likely than men to save enough for retirement. See Lorraine Schmall, "Women and Pension Reform: Economic Insecurity and Old Age" (2002) 35 J. Marshall L. Rev. 673.

[141] See e.g. *Employment Pension Plans Act*, *supra* note 32.

[142] See c. 2 above.

[143] *Supra* note 5.

[144] *Registered Retirement Plans Exemption Act*, *supra* note 8.

[145] In Alberta, see *Insurance Act*, *supra* note 2, ss. 554, 555, 575, 580. To be exempt, the plans must fit the requirements of the *Insurance Act* exemption sections.

2. Alberta exemptions are inconsistent and unjust

[98] Alberta law generally does not permit creditors to enforce their claims or judgments against pensions, or annuities and RRSPs issued by insurance companies.[146] However, non-insurance RRSPs can be taken by creditors under a writ of enforcement. When pensions, insurance annuities, RRSPs and RRIFs start to make payments to the depositor, exemptions again depend on who sells the retirement savings plan. Pension and insurance legislation will generally exempt obligations to pay out of a pension, RRSP or a RRIF.[147] However, money obligations payable out of a non-insurance RRSP or RRIF (after tax is deducted) will be fully garnishable.

[99] Such distinctions are hard to explain. Insurance and non-insurance vendors of RRSPs, DPSPs and RRIFs have copied each other's products to the point that the products are today largely indistinguishable from each other. Yet the insurance product is totally exempt while the similar plan purchased from another vendor is completely exposed to creditors' remedies. No respondent to our consultation memorandum sought to defend directly this apparent unfairness. If the products are virtually the same, it seems unjust and intolerable that they should be treated so differently in exemptions law. The injustice is more clear where employers offer private sector plans, like group RRSPs or DPSPs, as substitutes for or supplements to pensions. Such substitute plans serve much the same purpose as pensions but are not protected by pension exemption provisions.

[100] Pensions are different in some respects from future income plans and will be discussed more fully later. One observation may be made here. The total exemption of pensions and insurance retirement savings plans is apparently not a live political issue, judging by the public literature, although one of our respondents did suggest that pension obligations to pay should be partly garnishable on analogy to wages and salaries. If the total exemption of pensions and insurance retirement savings plans is not up for review, then it would appear to follow that non-insurance plans should be exempt as well.

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[146] The limits to the *Insurance Act*, *supra* note 2, exemptions are discussed in c. 2 above.

[147] It is less clear that LIRAs, LIFs and LRIFs and payments out of them are exempt. See discussion *supra* note 69.

3. RRSPs, DPSPs and RRIFs should be exempt

[101] It is not enough simply to say that retirement plans are treated inconsistently. We need to go further and ask whether in principle all retirement plans (pensions, insurance RRSPs and non-insurance RRSPs) should be exempt in whole or part from creditors' remedies. Our conclusion is that some exemption is justified for all such plans. We reserve to the next section the question whether the exemption should be partial or total.

[102] We start from the assumption that Canadian law properly recognizes saving for retirement as a value worthy of protection and encouragement. The Ontario Law Reform Commission, in its 1981 *Report on the Enforcement of Judgment Debts and Related Matters*, concluded that a person's interest in his or her pension plan should not be exigible. The Commission stated the policy in terms which we see as applying to RRSPs:

> We believe that pension plans serve an important function by providing generally much-needed income to retired pensioners without any other substantial financial resources. To permit exigibility of an interest in a pension plan, however limited or contingent at the time of seizure, would serve ultimately to destroy or at least diminish the very source of future economic well-being.[145]

[103] We agree. Permitting the creditor to take the retirement savings of the debtor may deprive him or her of income for retirement. Seizure or garnishment of retirement savings may contribute to putting the debtor on welfare or other government assistance, which is a very large and ongoing cost to society as a whole. As one of our consultants remarked, there is little social value in making retirees destitute. They simply become the responsibility of the state, which will harm all taxpayers.

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[145] Ontario Law Reform Commission, *Report on the Enforcement of Judgment Debts and Related Matters*, Part 2 (Toronto: Ontario Ministry of the Attorney General, 1981) at 104. The Commission also proposed at 178-181 that most pension obligations to pay should be garnishable, subject to exemptions applicable to income.

[104] When the courts held that annuities sold by insurance companies were not life insurance,[149] the *Uniform Life Insurance Act*, followed by all common law provinces, amended the definition of life insurance to include annuities or agreements to enter into annuities. The courts have interpreted this extended definition generously in cases where exemptions from creditors were at issue.[150] Legislature and courts alike have seen fit to encourage private saving for retirement and to protect such savings from creditors.

[105] Our system of creditors' remedies law has always included a list of assets and funds exempt from creditors' remedies. An important goal of such exemptions is to preserve property necessary to the survival of the debtor and the debtor's family. Our system has also exempted assets like pensions and insurance RRSPs which may not be necessary while the debtor is working, but will be crucial to his or her survival during the years of retirement (and unemployment).

[106] Exemptions in property exist now despite the possibility that the debtor can apply for welfare; in the same way, exemptions of RRSPs, DPSPs and RRIFs should not be rejected because most debtors can survive on Old Age Security and the Canada Pension Plan, supplemented by the Guaranteed Income Supplement and other welfare or assistance payments. The RRSP tax deferral is not much use if the corpus of the plan can be seized and disposed of by creditors. Exemptions law has always limited the assets which the creditor may reach; exempting savings for retirement is but another example.

[107] A conscientious owner of an RRSP may accumulate a substantial amount of money or valuable assets over a lifetime of saving. In a recent case in Newfoundland, the debtor, a retired doctor, owned insurance company RRIFs worth approximately $562,000. The RRIFs were held to be totally exempt as life insurance.[151] But a pension can also accumulate considerable value over a lifetime of employment. A substantial amount of capital is necessary to fund even a modest

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[149] *Gray v. Kerslake*, *supra* note 88.

[150] The cases on exemptions are discussed in c. 2 of this report.

[151] *Bank of Montreal v. Mercer*, *supra* note 92.

pension or retirement income. Moreover, the *Mercer* case can be seen as exceptional; trustees and lawyers experienced in bankruptcy and insolvency law tell us that many, perhaps most, debtors either have no RRSP or have long since cashed it in before their financial affairs collapse completely. As one of our consultants pointed out, there is a discriminatory quality about all exemptions. The more salary or property a debtor has, the larger the amount that can be claimed as exempt.

[108] A result of our proposal will be that creditors will be unable to realize their claims against a retirement savings plan, although our consultants have told us that RRSPs, DPSPs and RRIFs are rarely seized or made the subject of garnishee proceedings. To some extent, creditors can protect themselves by exercising care in extending credit or permitting debts to continue and grow without taking action. This outcome would be positive in many cases.

[109] It has been suggested that people save for retirement in different ways, such as paying off the home mortgage, and that we should fashion an exemption proposal for any scheme for building a retirement nest-egg. There are real difficulties in deciding which assets are intended to provide for one's retirement. We can avoid these problems by relying on the *Income Tax Act*, which has identified pensions, RRSPS, DPSPs and RRIFS as entitled to a special form of tax relief. There are numerous methods which people use to save for retirement, but pensions and registered retirement plans have been given special status in the *Income Tax Act* and other legislation, such as the *Insurance Act* and pensions statutes. We can fairly easily exempt these assets and leave a broader exemption for retirement nest-eggs generally for another day.

[110] RRSPs are often held by the self-employed and entrepreneurs. A consultant argued that such people depend on these plans to provide a predictable level of retirement income for them and their families. New businesses have a high rate of failure unrelated to any wrongdoing on the part of the entrepreneur. As an individual's RRSP grows over time, the desire to take risks diminishes because of the increasingly catastrophic consequences of a failed venture if creditors can take

one's entire retirement savings. Conversely, many future income plans provide venture capital through mutual funds.[152]

[111] The reports by the ULCC,[153] the Task Force,[154] Buckwold and Cuming[155] and the *Senate Committee Report*[156] all propose an exemption of future income plans from creditors, although they vary on the extent of the exemption. The "central legal statement" of the *ULCC Consultation Report* and the *ULCC Uniform Bill* is that "the contents of a 'planholder's' 'registered plan' are exempt from any legal process."[157] Pensions and insurance RRSPs are exempt, and it is unfair that non-insurance RRSPs should be exposed to execution. This policy has been enacted by Saskatchewan in the *Registered Retirement Plans Exemption Act*.[158]

[112] The Task Force notes that the federal government has made a policy choice favouring retirement savings.

> The rationale for this policy choice is the importance of encouraging Canadians to plan for their retirement, so as to promote individual financial responsibility and to ensure that senior citizens do not become solely reliant on the public purse. The policy choice is evidenced by the exempt status afforded to Registered Pension Plans (RPPs) available to employed Canadians, through significant tax incentives available both for RPPs and

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[152] In the United States as in Canada, exemptions in bankruptcy vary widely from state to state. A recent American study of unincorporated business bankruptcies shows that higher bankruptcy exemption levels benefit potential entrepreneurs who are risk averse by providing partial wealth insurance. The probability of starting small businesses rises in states with higher exemptions. See Wei Fan and Michelle J. White, "Personal Bankruptcy and the Level of Entrepreneurial Activity" (Cambridge, Massachusetts: National Bureau of Economic Research, November, 2002), online: <http://www.nber.org/papers/w9340>.

[153] *ULCC Consultation Report* and *ULCC Uniform Bill*, *supra* note 5.

[154] *Task Force Report*, *supra* note 10.

[155] Tamara M. Buckwold and Ronald C.C. Cuming, *Interim Report on Modernization of Saskatchewan Money Judgment Enforcement Law* (Regina, Saskatchewan: Queen's Printer, November, 2001).

[156] *Senate Committee Report*, *supra* note 11 at 24-29.

[157] *ULCC Uniform Bill*, *supra* note 5 at 169.

[158] *Supra* note 8.

> RRSPs, and through the prohibition against lenders taking security against RRSP investments.[159]

The Task Force notes the inconsistency of treatment as between pension and insurance RRSPs, compared to non-insurance RRSPs. It is concerned that the prudent and well-advised debtors can protect their retirement savings by using insurance RRSPs while other debtors make the mistake of using non-insurance products. We agree.

4. The exemption should be total, not partial

[113] Assuming that RRSPs, DPSPs and RRIFs and obligations to pay out of such plans should be exempt in whole or in part from creditors' remedies, three questions remain:

(1) Should the exemption from creditors' remedies be total? That is, should the RRSP, DPSP and RRIF and obligations to pay out of such plans be completely exempt in all circumstances, regardless of the balance in the plan, the other assets of the debtor, and the respective merits of the debtor and creditor?

(2) If the answer to question (1) is yes, should the total exemption apply to all prejudgment and postjudgment remedies available to creditors?

(3) If a total exemption is rejected, what limits are appropriate?

[114] Our conclusion is that questions (1) and (2) should be answered yes. Question (3) need not be answered. We will first set out our reasons for proposing a total exemption of these assets, and then answer possible objections.

[115] In the previous section, we set out several reasons why retirement income plans should be exempt. In our view, they also support a total exemption of these assets. The argument of the previous section can be summarized as follows:

(1) The present patchwork of exemptions for pensions, insurance and non-insurance retirement income plans is incoherent and unjust.

(2) Canadian law recognizes saving for retirement as a value worthy of protection and encouragement.

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[159] *Task Force Report*, *supra* note 10 at 17.

(3) Permitting the creditor to take the retirement savings of the debtor may deprive the latter of income for retirement and may contribute to putting the debtor on welfare or other government assistance, an expensive and undesirable result.

(4) Pensions, RRSPs, DPSPs and RRIFs may not be necessary while the debtor is working but will be crucial to his or her survival during the years of retirement (and unemployment).

(5) A substantial amount of capital is necessary to fund even a modest pension or retirement income.

(6) Many, perhaps most, debtors either have no RRSP or have long since cashed it in before their financial affairs collapse completely. The practical impact of a total exemption will be minimal in most situations.

(7) Once a pension or RRSP is seized, its replacement is almost impossible, especially for an older debtor.

(8) To some extent, creditors can protect themselves by exercising care in extending credit or delaying collection proceedings.

(9) People save for retirement in various ways, but the *Income Tax Act* has singled out pensions, RRSPS, DPSPs and RRIFS as entitled to similar forms of tax exemption.

(10) RRSPs are often held by the self-employed and entrepreneurs. Their exemption encourages entrepreneurs to continue an economically beneficial activity which may entail risks unrelated to any wrongdoing on the part of the entrepreneur.

(11) Many mutual fund RRSPs and DPSPs provide venture capital, a positive influence on the economy.

[116] Our legal system has opted for total exemption from creditors' remedies of pensions and insurance RRSPs.[169] We have noted little call for diluting these exemptions. Pensions, insurance and non-insurance retirement income plans all serve the same purpose: saving for retirement, as evidenced by their common tax treatment. RRSPs, DPSPs and RRIFs are pension-substitutes available to self-

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[169] The exemption of LIRAs, LIFs and LRIFs is not so clear. See discussion *supra* note 69. Insurance RRSPs are exempt only if they meet the requirements of the *Insurance Act*, *supra* note 2, exemption sections.

employed workers and employees in workplaces with no pension plan. They are similar enough to pensions that they should enjoy the same exemption in creditor-debtor law. This point is even stronger where employers offer their employees group RRSP or DPSP schemes in addition to or in substitution for pension plans. Put another way the category of assets deserving of protection is tax-protected vehicles for retirement saving. Pensions and RRSPs fall into this category and should have the same exemption.

[117] People are unlikely to use RRSPs as savings accounts or term deposits. If someone is saving up to take a trip next year, the last thing he or she will do is put the money in an RRSP. The principal reason is that when the money is withdrawn, it will be taxed as income, a result which will not follow if the money is in a bank account or a term deposit. When an owner thinks of withdrawing money from an RRSP, he or she will hesitate because (1) the money was originally deposited to a retirement nest-egg, and (2) the withdrawal will result in a tax liability.

[118] Viewed from the position of the consumer of these financial services, pensions and RRSPs serve the same purpose: saving for retirement. The consumer who works in a non-pensionable employment or in a business has no choice; he or she must save by using RRSPs in order to obtain the favourable tax exemption offered to pensions and RRSPs. These plans deserve similar exemptions because they serve the same social goal, to encourage people to accumulate retirement savings which will be increasingly essential in the future.

[119] When pensions, insurance annuities, and RRSPs or RRIFs start to make payments to the depositor, the creditor's appropriate remedy is to attach the money before it is paid. Exemptions are again inconsistent. Pension and insurance statutes expressly prohibit garnishment of pension obligations to pay out of those plans However, money payable out of a non-insurance RRSP or RRIF (after tax is deducted) is fully garnishable.

[120] In our view, the total exemption policy for money payable from pensions and insurance RRSPs, DPSPs and RRIFs should extend to obligations to pay out of non-insurance RRSPs, DPSPs and RRIFs. Such payment obligations are usually

attached during retirement years when people are in a poor position to earn more money by working overtime, working a second job, or finding a better job. Retirement is when the income is needed and cannot be replaced or supplemented. The Buckwold-Cuming report on Saskatchewan judgment enforcement law makes a similar recommendation.[161] Any enforcement process that renders retirees destitute simply ensures that they will become the responsibility of the state. Given that the income from a RRIF may make up most of the retiree's income, total exemption of obligations to pay is not unreasonable.

[121] Our recommendation is limited to obligations to pay from a future income plan. If there is an agreement that the depository will pay the depositor $5000 from a future income plan but the money is unpaid, the obligation to pay should be exempt from attachment. Our recommendation does not deal with the money after it is paid, because we have excluded from our project the general law regarding the survival of exemptions after changes in form of the exempt asset.[162] Nor do we have to deal with the depositor who has placed assets like securities in the RRSP and then draws them out because, once the securities are withdrawn from the plan, they are governed by the general law and are likely exigible.

[122] The amount of income a retired person can take from the fund is indirectly limited by the maximum annual contribution allowed under the *Income Tax Act* to RRSPs. We are told that most debtors and bankrupts either have no RRSPs or have cashed them in before their financial collapse. Money payable from pensions and insurance RRSPs is usually totally exempt.

[123] We were concerned about one problem which might arise from a total exemption of money obligations. A total exemption may not cause problems where the holder of a RRIF receives periodic payments akin to salary. However, what about the case of a depositor who collapses his or her RRSP and agrees to receive a large lump sum payment, all of which is exempt? We thought of modifying the total exemption rule to exclude money payable as a result of the collapse of the

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[161] Buckwold and Cuming, *supra* note 155 at 119, 123.

[162] See c. 1 above.

plan or other large payments. We were struck by the difficulty of drafting such an exception.[163] We concluded that the better solution was not to create any exception for a situation unlikely to arise in practice, because the creditor will probably not have advance knowledge that the debtor is about to make a large withdrawal from the plan. The result is that our proposed exemption will extend to all sums payable from RRSPs, DPSPs and RRIFs, including those resulting from partial or total collapse of the plans.

5. The exemption should extend to all future income plans, whether locked in or not

[124] The Task Force has proposed that any exemption of RRSPs in bankruptcy should be limited to locked-in plans.

> An RRSP exemption will be available to bankrupts only if they convert the RRSP, shortly following the date of bankruptcy, into a locked-in RRSP or annuity that will be accessible only after their retirement. In effect, the RRSP will be converted into a locked-in RRSP similar to that prescribed by pension legislation when an employee's vested pension rights are terminated due to a loss of employment status.[164]

[125] The intention is to protect "the integrity of the bankruptcy system" which will suffer if debtors can claim the RRSP exemption, only to withdraw the protected funds and assets shortly after or even during the bankruptcy.

> The policy rationale underlying an RRSP exemption only applies if the RRSP is truly intended for retirement purposes. This purpose, and hence this policy goal, is guaranteed by the lock-in. Without the conversion to locked-in status, the exemption might merely assist the debtor to preserve tax-deferred savings until shortly after the bankruptcy discharge. There is no policy reason for this.[165]

The Task Force would allow an exception to the locking-in regime in cases of financial hardship, along the lines of present Ontario pension legislation.[166]

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[163] Should the exemption apply to payments after "retirement" or age 65, but not before? Should it apply to large payments but not small? To payments from a RRIF but not an RRSP? Should the exemption not apply where a plan is "collapsed"?

[164] *Task Force Report*, *supra* note 10 at 23.

[165] *Ibid.* at 24.

[166] *Pension Benefits Act*, R.S.O. 1990, c. P.8, s. 67(5)-(7).

[126] The *Senate Committee Report*[167] follows with modifications the proposals of the Task Force. The committee argues that "fairness to creditors requires that RRSPs be locked in" and its proposed exemption is available only if "the Registered Retirement Savings Plan is locked in."[168] It is unclear whether the committee wishes to limit the exemption to RRSPs locked in from the beginning or if it agrees with the Task Force idea of the bankrupt electing to lock in the plan during the bankruptcy.

[127] We have considered restricting our proposed exemption to locked-in plans but have decided not to adopt this severe limit to the proposal. RRSPs are intended, among other things, to provide a source of retirement income, whether the plan is locked in or not. At bottom, the Task Force idea assumes that only pension-like instruments deserve to be exempt. One may take a broader view and permit exemptions of unlocked RRSPs, even though saving for retirement is not the only use of such plans. The *Income Tax Act* does not limit the RRSP program to locked-in plans. Should Alberta judgment enforcement law add such a limitation?

[128] The *ULCC Consultation Report* rejected the idea of limiting their exemption to locked-in plans.[169] One reason is that the ULCC proposed that funds held in RRSPs and DPSPs would retain their exempt status only so long as they retain their status as RRSPs and DPSPs under the *Income Tax Act*. This idea is discussed below.[170] The ULCC thought that a locking-in limitation had serious flaws which made it practically undesirable and unworkable. The full discussion by the ULCC is lengthy, but the basic thrust is that locking-in would make RRSPs and DPSPs less desirable in the market, might adversely affect credit granting, and would be an administrative quagmire. Locking-in makes no appearance in the *ULCC*

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[167] *Senate Committee Report*, *supra* note 11.

[168] *Ibid.* at 29.

[169] *ULCC Consultation Report*, *supra* note 5 at 259, 264-267.

[170] Recommendation 5.

Uniform Bill or in the Saskatchewan Act which implements (with modifications) the ULCC proposals.[7]

[129] The market does not currently offer locked-in RRSPs, although it might do so if consumers could see clear advantages to purchasing such plans. In any event, all future income plans are de facto locked in for two reasons: (1) funds and property withdrawn from a plan will be taxable, and (2) our proposed exemption applies to property in a plan and does not apply to property once withdrawn. This double hit, plus the desire to continue retirement savings, will give depositors a strong incentive to leave future income plans alone.

[130] Nor are we sure that a locked-in regime can work for RRSPs. The pension locking-in system depends, among other things, on the highly regulated and heavily administered nature of pensions. The pension administrators have no mandate to review what RRSP depositories do. Much of the complex legislation governing locking-in of pensions is driven by elements of the tax law and by the group character of pensions in which preservation of the pension fund is necessary to pay pension to retirees and to cover administrative costs, as well as to ensure that future pension commitments are honoured. An RRSP is an individual fund governed by different rules. The pension system would not be suitable for RRSPs. If we were to create a new system of locking-in rules applicable to RRSPs, we would be inventing brand-new legislation which would be a recipe for litigation and which would be onerous and difficult to operate. It is unlikely that most creditors would want to use repeated debtor questionnaires or examinations in aid to check on the present status of an RRSP.

[131] Ultimately, we see the goals of pensions and future income plans, whether locked in or not, as the same. They are intended and largely used for retirement saving. They all fall within our desired policy which is to protect such retirement nest-eggs from enforcement proceedings by creditors. We conclude that any exemption of future income plans should not be restricted to locked-in plans.

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[7] *Registered Retirement Plans Exemption Act*, *supra* note 8.

6. The exemption should not be limited by a dollar cap

[132] The Task Force proposes a dollar cap on the amount of the RRSP exempt in bankruptcy.

> The exemption will be capped. The maximum amount exempted will be equal to the maximum RRSP contribution limit in the year of bankruptcy multiplied by the number of years that the bankrupt's age exceeds 21, to a limit of age 65.[172]

The Task Force explains how the formula would work.

> For example, using the current $14,500 contribution limit, a forty-one year old bankrupt will have an RRSP cap of $14,500 multiplied by 20, or $290,000. The cap for a fifty-one year old will be $435,000 while that for a sixty-one year old will be $580,000. This works out a rough parity with pension values, although it does not reflect the full accrual of interest and hence it may be substantially lower than the pension value of a high-earning employee.[173]

The Task Force notes that pension exemptions are not capped, but is concerned about two situations in which a cap on the RRSP exemption is needed.

> One is that some RRSPs may grow extremely large as a result of shrewd or speculative investments in a self-directed RRSP. A comparable problem arises where the individual has over-contributed to the RRSP, above the tax-free limit. Both of these cases may result in the RRSP having a value far exceeding any comparable pension plan, and exceeding any limit that creditors could comfortably stomach.[174]

[133] The *Senate Committee Report* agrees with the idea of a dollar cap but defines it differently. The report recommends that "the exempt amount is no greater than a maximum amount to be set by regulation and increased annually in accordance with increases in the cost of living as measured by the Consumer Price Index."[175] The report does not say what factors the regulators are to consider in setting the initial dollar cap.

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[172] *Task Force Report*, *supra* note 10 at 26.

[173] *Ibid.* at 26.

[174] *Ibid.* at 25.

[175] *Senate Committee Report*, *supra* note 11 at 29.

[134] The ULCC opposes a dollar cap, partly because it creates a danger of differing rules across the country.[170] The ULCC argues that pension exemptions have no dollar limit, and RRSP exemptions should be the same. The ULCC also says that the maximum annual contribution limit works as a de facto cap on the total amount of funds or property which can be placed in an RRSP or similar plan. The danger of abuse of the RRSP exemption can be lessened by, for example, restricting the exemption to RRSPs which retain that status under the *Income Tax Act*. Buckwold and Cuming also reject the dollar cap to any RRSP exemption.[171]

[135] We have concluded that the proposed exemption of future income plans should not be limited by a dollar cap. Our basic policy is that tax-protected vehicles for retirement saving including pensions and RRSPs should be exempt. Pensions and insurance RRSPs are exempt now without any dollar limit except the ceiling imposed by the *Income Tax Act*. A future income plan must contain substantial funds or property to create even a modest income stream during retirement. Such funds and property need to be exempt from creditors' remedies.

[136] We agree with the ULCC that the maximum annual contribution limit to a future income plan operates as an effective ceiling on the value of such a plan,[172] and we know that many taxfilers contribute far less than the maximum limit permits.[173] We doubt that overcontribution as a debt avoidance device is likely to occur as it results in heavy and continuing tax penalties. It is prohibitively expensive. To further deter abuse, we will limit the proposed exemption to plans which retain their status under the *Income Tax Act*.[174]

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[170] *ULCC Consultation Report*, *supra* note 5 at 256-263; 263-264; *ULCC Uniform Bill*, *supra* note 5 at 168-169.

[171] Buckwold and Cuming, *supra* note 155 at 123.

[172] And we doubt that CCRA, in its role as creditor, is likely to want the RRSP annual contribution limit to be greatly increased.

[173] Stats. Can., *RPPs and RRSPs*, *supra* note 36 at 52-54.

[174] Recommendation 3.

7. There should not be a clawback of contributions

[137] The Task Force, followed by the *Senate Committee Report*,[136] has attached another restriction to its proposed RRSP exemption which is, to our knowledge, unique in the reform literature. It is a right to claw back contributions made by the depositor to the RRSP within three years[137] of the bankruptcy. The Task Force makes the following recommendation:

> All RRSP contributions (including contributions to a spousal RRSP) made by the debtor within three years of the date of the initial bankruptcy event, will accrue to the trustee as property divisible among creditors. This will be an irrebuttable vesting; that is, it will not be dependent upon any fraud test or judicial determination. Contributions outside the three-year mark will continue to be subject to fraudulent conveyance attack under existing provincial legislation.[138]

[138] The motive for the proposal is in part frustration with slow, expensive and uncertain fraudulent conveyance and preference litigation. It is based on an assumption that money paid into an RRSP within three years of bankruptcy was probably paid at a time when it could have been used to repay debts.

> The clawback also discourages strategic behaviour by debtors. For example, if the period were shorter, debtors might be able to make a significant RRSP contribution in anticipation of bankruptcy, perhaps by utilizing unused RRSP eligibility limits. They could then hold creditors off for the requisite short period in order to bullet-proof the RRSP.[139]

The irrebuttable test is intended as "a cheap and effective anti-avoidance device ... to ensure creditor confidence."[140]

[139] We do not agree with this restriction of the proposed exemption of future income plans. Pensions and insurance RRSP exemptions are not subject to a clawback for recent contributions, nor should they be. If the goal is to protect retirement savings and if the contributions to the RRSP fit within the income tax annual contribution limit, they should be exempt.

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[136] *Supra* note 11 at 29.

[137] The Senate Committee proposes a one year clawback.

[138] *Task Force Report*, *supra* note 39 at 21.

[139] *Ibid.* at 20.

[140] *Ibid.* at 21.

[140] The Task Force proposal would no doubt enable trustees to take automatically and more cheaply contributions made within the three years preceding the bankruptcy. In our view, however, the requirements of fraudulent conveyance and preference statutes exist for a reason, to effect a fair balance between debtor, creditor and transferee. The appropriate balance should not be abandoned in order to make things easier for trustees and creditors. We do not see why all contributions to an RRSP made within three years of the creditor's attempt to seize the plan were necessarily made at a time of impending insolvency. Many North American investors have recently experienced quick changes in market prices of their property. A three year cut-off period may be too generous for some and unjustly harsh for others. It may be that the fraudulent conveyance and preference legislation is in need of reform, but quick fixes like the proposed three year irrebuttable clawback seem too short a way with the problem.

[141] A further difficulty is to apply the clawback idea to a provincial judgment enforcement system. Should the creditor, acting through a civil enforcement agency, be entitled to demand the three years' contributions from the depository? Should the relevant base date be the date of the judgment or of the writ of enforcement? Or should it be earlier, e.g., the date when the statement of claim was issued, or when the underlying claim arose? Should the clawback be automatic, or should it be available only for unusual or abnormal payments? If so, how do the legislature and the courts define what is usual or normal? Put simply, this seems to be an idea so complex that it will not work except in the most peculiar of cases. Even if the clawback idea is appropriate in the bankruptcy context where it is essential to gather up as much of the bankrupt's property as possible because the provable claims will be discharged at the end of the bankruptcy, it is not essential or desirable in a provincial judgment enforcement system where the judgment survives until it is paid or until other events occur which are not relevant in this report.[156]

[142] The *Senate Committee Report* follows the Task Force proposal but would reduce the clawback period to one year prior to bankruptcy. While the change will

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[156] The clawback is not part of the *UJEC Uniform Bill*, *supra* note 5 or the Saskatchewan *Registered Retirement Plans Exemption Act*, *supra* note 8.

avoid some of the obviously unfair and arbitrary results of the three year clawback, the objections in principle and the administrative problems remain.

8. The exemption should not be subject to judicial discretion

[143] In the consultation memorandum, we asked if the court should be given a discretion to increase, decrease or eliminate the exemption on application by any interested party. Judicial discretion might be a method of dealing with the occasional debtor who abuses the exemption and uses the plan as a device to defeat creditors. We noted a similar power in the court to vary wage and salary exemptions in appropriate cases, taking into account a list of relevant factors.[147]

[144] A variation of this idea is the proposal by Buckwold and Cuming that a judgment debtor should not be entitled to stack retirement funds or income. They recommend that the court should have the power to order that the exemption of RRSPs or RRIFs "does not apply where the applicant establishes that the judgment debtor has vested rights in a pension plan or post-retirement income from other sources sufficient to provide support for the judgment debtor and dependents of the judgment debtor."[148]

[145] Commentators on the consultation memorandum were generally negative about the judicial discretion idea, and we have decided not to propose it as an element of the exemption. We have argued the clear need for a substantial exemption of registered retirement income plans. If the principle supports an absolute exemption, as we believe it does, it seems wrong to invite people to litigate the reduction or elimination of the exemption in specific cases.

[146] Including a judicial discretion exception to the exemption encourages the parties to litigate the merits of the exemption in any case where enough money is involved to justify the expense. Several consultants suggested the need for the exemption to be clear and simple so that lawyers, trustees, creditors and debtors can settle their affairs without working out excessively complex legal issues.

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[147] *Civil Enforcement Act*, *supra* note 19, s. 81(1)(g)(h); *Civil Enforcement Regulation*, *supra* note 21, s. 39.

[148] Buckwold and Cuming, *supra* note 155 at 123.

Simplicity would be undermined by a judicial discretion exemption as by the dollar cap, the locking-in rule and the three year clawback discussed above.

[147] Our consultants were also cool to the Buckwold-Cuming proposal. Many people today have worked several jobs, accumulating rights in one or more pension plans as well as RRSPs. The Buckwold-Cuming proposal suggests that the person who accumulates plans is less entitled to the exemption than the person who works at one pensionable employment during his or her life, or works at a non-pensionable job but has a long-standing RRSP. Why? The *Income Tax Act* annual ceiling on contributions applies to both pensions and RRSPs, and does not allow a taxpayer to double the ceiling by contributing to both types of retirement plans. There is only one all-embracing ceiling for money paid to RPPs and RRSPs. This limit in the tax system is adequate protection against the debtor who accumulates too many pension and retirement savings plans.

9. Other reform projects considered

[148] Other law reform studies vary in the extent of their proposed exemptions. We discuss them below along with the Saskatchewan *Registered Retirement Plans Exemption Act*[155] which is a version of the *ULCC Uniform Bill*.

a. Buckwold and Cuming

[149] The most generous recommendation is made by Buckwold and Cuming[156] who would extend a total exemption to RRSPs and RRIFs (but not DPSPs) and to money payable out of such plans. The exemption would protect the property from all creditors' remedies, including garnishment. The Buckwold and Cuming report supports our policy of total exemption, subject to one limitation discussed above.[157]

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[155] *Supra* note 8.

[156] *Supra* note 155 at 119-120, 125.

[157] See judicial discretion discussion above.

b. ULCC Consultation Report and ULCC Uniform Bill

[150] The *ULCC Consultation Report*,[192] followed by the *ULCC Uniform Bill*,[193] proposes different rules for enforcement and garnishment. As to enforcement, the ULCC advocates a total exemption of RRSPs, DPSPs and RRIFs. Its reasons are that the present system of exemptions is unfair and that the total exemption approach taken by pensions and insurance legislation should extend to all registered retirement plans.

[151] The ULCC proposes a different regime for garnishment. "Payments"[194] from such a plan should be garnishable, subject to exemptions similar to the exemption of wages and salary under provincial creditors' remedies law. The *ULCC Consultation Report* and the *ULCC Uniform Bill* are unclear whether the exemption system applies to equitable execution.[195] The ULCC, in the commentary to s. 5 of its uniform bill, argues the policy:

> Thus while section 4 provides that these payments are individually exigible, and clause 5(a) allows the payments to be accessed by garnishment proceedings, clause 5(b) is intended to ensure that subsistence levels are maintained for the planholder and that only the amount in excess of such provincial limits are exigible. This is viewed as consistent with the overall policy goal of ensuring adequate retirement funds for a plan holder but not protecting funds from legitimate creditors with respect to the portion of those funds that are in excess of this policy goal.[196]

[152] We agree with the ULCC proposal to exempt totally the corpus of future income plans from enforcement. We have examined carefully the ULCC partial exemption of obligations to pay from such plans but are unable to accept this part of the *ULCC Uniform Bill*. We earlier argued that money obligations from future income plans are usually attached during retirement years when people are in a

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[192] *Supra* note 5 at 256-261, 263-264.

[193] *Supra* note 5 at 168-169.

[194] The ULCC throughout the *ULCC Consultation Report* and the *ULCC Uniform Bill*, *supra* note 5 use the word "payment," which may refer to money payable or money actually paid. "Payment" is also used in the Saskatchewan *Registered Retirement Plans Exemption Act*, *supra* note 8.

[195] See discussion *supra* note 106.

[196] *ULCC Uniform Bill*, *supra* note 5 at 171.

poor position to earn more money by working overtime, working a second job or finding a better job. Retirement is when the income is needed and cannot be replaced or supplemented. Any enforcement process that renders retirees destitute simply ensures that they will become the responsibility of the state. We also noted that the amount of income a retired person can take from the fund is limited indirectly by the maximum annual contribution allowed under the *Income Tax Act* to RRSPs. Money payable from pensions and insurance RRSPs is usually totally exempt.

[153] The ULCC proposal incorporates the wage and salary exemption scheme, which is going to need considerable tailoring to deal with irregular payments from these plans. For example, if a depositor asks for an RRSP to be collapsed and the entire balance paid out, would the depositor be entitled to only one monthly exemption? The debtor who can create a system of regular payments just below the monthly exemption will be much more favourably treated. Any partial exemption scheme will need to take into account the diversity of payments which can be made out of a retirement savings plan as well as the greater difficulty for retirees to earn extra income. The "keep it simple" principle supports a total exemption from garnishment.

c. *The Registered Retirement Plans Exemption Act*[197]

[154] A modified version of the *ULCC Uniform Bill* has been enacted in Saskatchewan. We discuss the Act in c. 2. Our earlier comment on the ULCC proposals applies here. We accept the total exemption of future income plans from enforcement but we do not agree with the limited exemption of obligations to pay out of such plans. Such obligations should be totally exempt.

d. Task Force

[155] The most limited of the exemption proposals is advanced by the Task Force. It relies on three principal arguments.

1. It is inappropriate for the bankruptcy system to treat RRSPs exactly in the same way as pensions. Pension contributions are normally mandatory,

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[197] *Supra* note 8.

regular, periodic, fixed in amount, locked in and intended for retirement. RRSP contributions, on the other hand, are voluntary, dependent on the unfettered wishes of the contributor,[198] unlocked and intended for all sorts of goals.

2. Sound public policy ought to support and encourage prudent retirement planning. Some exemption for RRSPs is appropriate. "At the same time, the BIA ought not to be available for strategic use by those who intend to shelter their assets from the reach of impending or foreseeable creditors. An overly generous exemption policy would invite abuse."[199]
3. The integrity of the bankruptcy system will suffer, and creditors will be frustrated, if debtors "succeeded in preserving their RRSPs through the bankruptcy process, only to be in a position to access the preserved cash shortly following, or even during, the bankruptcy."[200]

[156] These principles lead the Task Force to propose a partial exemption from the bankruptcy of RRSPs and of money payable from such plans. The plan itself will be exempt subject to three principal limitations which are discussed more fully above but which can be summarized as follows:

1. "An RRSP exemption will be available to bankrupts only if they convert the RRSP, shortly following the date of bankruptcy, into a locked-in RRSP or annuity that will be accessible only after their retirement."[201]
2. The exemption should be limited by a dollar cap "equal to the maximum RRSP contribution limit in the year of bankruptcy multiplied by the number of years that the bankrupt's age exceeds 21, to a limit of age 65."[202]
3. The Task Force, followed by the *Senate Committee Report*,[203] has proposed a third restriction on its proposed RRSP exemption which is, to our knowledge,

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[198] Subject to the maximum annual contribution limits under the *Income Tax Act*, *supra* note 6.

[199] *Task Force Report*, *supra* note 10 at 18.

[200] *Ibid.*

[201] *Ibid.* at 19.

[202] *Ibid.* at 21.

[203] *Supra* note 13 at 29.

> unique in the reform literature on future income plans. It is a right in the trustee to claw back contributions made by the depositor to the RRSP within three years of the bankruptcy. "This will be an irrebuttable vesting; that is, it will not be dependent upon any fraud test or judicial determination."[204]

[157] As to money payable from the plan, the Task Force proposes that it should be property of the bankruptcy subject to an exemption based on the surplus income standards applied in bankruptcy to income such as wages and salary.[205] The Task Force does not justify specifically its partial exemption of money payable from RRSPs. One assumes that it relies on the danger of strategic use of the exemption by debtors seeking to shelter assets from creditors, and the threat to the integrity and reputation of the bankruptcy system if debtors preserve too much of their property after discharge.

[158] We have considered very carefully the Task Force proposal but we do not accept it in preference to our approach. We discuss above the three limitations to the Task Force exemption, i.e., the locking-in rule, the dollar cap and the three-year clawback. It may be useful here to make some observations about the Task Force's policy generally.

[159] The Task Force emphasizes the differences between pensions and RRSPs in fashioning its limitations on its proposed exemption. No doubt such differences exist. However, pensions and future income plans are sufficiently similar in purpose that the total exemption which applies to pensions should be extended to RRSPs, DPSPs and RRIFs. Pensions and future income plans have the same goal: saving for retirement. They are treated similarly in income tax law. They are strikingly different in purpose and structure from other wealth accumulation devices which may incidentally function as retirement saving schemes. Pension funds are usually locked in as a matter of law and contract, although the locking-in

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[204] *Task Force Report*, *supra* note 10 at 21.

[205] *Ibid.* at 19, 22-23. The reference is to the *Bankruptcy and Insolvency Act*, *supra* note 9, s. 68.

regime is far from total.[206] Group RRSPs may be locked in because the contract between the employer and the employees so provides. Individual RRSPs are rarely locked in as a matter of law, but the tax penalty for taking funds and property out of these plans works as a de facto locking-in of those assets. Fundamentally, however, pensions and future income plans are primarily intended to be vehicles for retirement saving. This common purpose should dictate similar exemptions from creditors' remedies.[207]

[160] The Task Force relies heavily on the differences between pensions and future income plans to justify the very restrictive exemption of RRSPs in bankruptcy.[208] The proposed *Bankruptcy and Insolvency Act* exemption will override any different exemptions in provincial law, including exemptions in the *Insurance Acts*. It is not clear whether the proposal will be enacted. The more limited approach to exemptions by the Task Force may be explained in part by the fact that most provable claims in bankruptcy will be discharged at the end of the process. Claimants in bankruptcy have one shot at getting their claims paid, while creditors in the provincial judgment enforcement system can continue enforcement efforts as long as they want, if they keep their judgment and writ in force.

[161] The Task Force identifies four distinctions between pensions and RRSPs which justify different treatment:

> First, pension contributions are normally mandatory as a condition or benefit of employment, and normally include an employer's contribution. RRSPs are voluntary and normally fully self-funded, perhaps through borrowing. Second, pension contributions are normally regular, periodic and fixed in amount. RRSP contributions are self-determined in amount, often irregular, and are purely a matter of individual planning. Third, pensions cannot normally be accessed until retirement. RRSPs are normally liquid so that they can be cashed or collapsed at any time, subject to a tax penalty. Fourth, RRSPs are

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[206] There are reasons for locking in pension funds which are completely unrelated to creditors' remedies and which do not apply to RRSPs. Pensions are group funds, and locking-in is necessary to ensure that there will be enough money in the fund to cover pension payments and administrative costs.

[207] If pension exemptions change in the future, any future income plan exemptions should follow suit.

[208] *Task Force Report*, *supra* note 10 at 17-24.

> often utilized as tax-deferred savings vehicles and are not intended exclusively, or even primarily, for retirement.[209]

No doubt these are significant differences. Nevertheless, the goal of these plans is similar: to save for retirement. We find it difficult to see RRSPs as "liquid" in the sense in which a bank account is liquid, because RRSPs are in our view primarily intended for retirement and because a withdrawal of money from an RRSP will be visited with a tax liability. Saving for retirement is a primary goal of RRSP investors. If pensions and RRSPs were so different, one would expect that difference to be reflected in the *Income Tax Act*. Instead, a similar taxation system applies to both. We understand the Task Force's concern for prudent retirement planning and its fear for the integrity of the bankruptcy system if debtors can manipulate the exemption of RRSPs to preserve cash. Our exemption respects the need for retirement planning.

e. Senate Committee Report

[162] The *Senate Committee Report* does not analyse the arguments and evidence before it in detail, but its recommendations are close to those of the Task Force.[210] Two additional points can be made:

1. The reduction of the clawback period from three years to one will avoid some of the unfair and arbitrary results of the longer period, but the Institute's objections in principle remain.
2. The dollar ceiling in the Task Force Report was pinned to the maximum annual contribution limit in the income tax legislation. It had the virtue of being a figure based on the government's estimate of the amount of capital needed to provide an adequate income stream to retired people. The Senate Committee rejected this idea and, without stated reasons, chose a dollar ceiling "to be set by regulation."[211] The Senate Committee gives no guidance as to how the limit is to be set although it does propose annual cost of living increases. The Institute has expressed above its opposition to any dollar ceiling to the exemption.

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[209] *Ibid.* at 18.

[210] *Senate Committee Report*, *supra* note 11 at 29.

[211] *Ibid.*

10. The exemption should apply to all prejudgment and postjudgment creditors' remedies

[163] In our view, the exemption of future income plans, and obligations to pay money out of such plans, should apply to all prejudgment and postjudgment remedies available to creditors. There is no reason why any remedies should be excluded. If we are right that the asset is essential for the survival of the debtor during retirement, then the particular remedy relied on should make no difference. As a result, the exemption will apply to enforcement (or execution), garnishment and equitable execution. Prejudgment remedies caught by the exemption include attachment orders under Part 3 of the *Civil Enforcement Act*, as well as processes like the *Mareva* injunction[212] granted under s. 13(2) of the *Judicature Act*.[213] However, the exemption should not extend to non-money claims or judgments based on property rights or on the enforcement of security taken on the future income plan, assuming such a security to be permitted by law.[214]

[164] We should say more about equitable execution. In our view, it is a remedy like the others and should be subjected to the same rules. We earlier considered and rejected the idea that the court should on application be able to modify or eliminate the exemption in a particular case. Permitting a court to accomplish this result indirectly by granting a receivership order is equally wrong. The policy that equitable execution is available only against exigible, that is, non-exempt, assets has been made clear in s. 85 of the *Civil Enforcement Act*[215] which provides that the remedy is available only against "certain exigible property." Section 1(1)(u) of the same Act provides that "'exigible' means, with respect to property, not exempt from writ proceedings or distress proceedings." This restriction does not expressly restrict the grant of a receivership order under s. 13(2) of the *Judicature Act*,[216]

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[212] Named after one of the early cases granting the remedy: see *Mareva Compania Naviera S.A. v. International Bulk Carriers S.A.*, [1975] 2 Lloyd's Rep 509, [1980] 1 All E.R. 213 (C.A.). See generally Dunlop, *Creditor-Debtor Law in Canada*, *supra* note 23 at 157-186.

[213] *Supra* note 82.

[214] See discussion c. 2 above.

[215] *Supra* note 19.

[216] *Supra* note 82.

although Perras J. in *A. (K.L.) v. S. (R.C.)*[217] holds that similar principles apply. Our recommendation is intended to apply to receivership orders granted under the *Civil Enforcement Act* or the *Judicature Act*.[218]

[165] In our proposed draft statute,[219] we accomplish the above result by having the remedy extend to any "enforcement process." The term is defined to mean "writ proceedings, attachment orders under Part 3 and any other prejudgment and postjudgment remedies under any other enactment or law that may result in a money judgment."[220] The definition goes on to exclude "a remedy of a secured creditor enforcing the secured creditor's security."

RECOMMENDATION No. 1
RRSPs, DPSPs and RRIFs, and obligations to pay money from such plans, should be completely exempt from all writ proceedings as defined in the *Civil Enforcement Act*, attachment orders under Part 3 of the *Civil Enforcement Act* and any other prejudgment and postjudgment remedies under any other enactment or law that may result in a money judgment. The exemption will not extend to non-money claims or judgments based on property rights or on the enforcement of security taken on the future income plans.

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[217] *Supra* note 81; cf. *Frah v. Marr*, *supra* note 81.

[218] The exemption created by the Saskatchewan *Registered Retirement Plans Exemption Act*, *supra* note 8, may not apply to equitable execution. See discussion *supra* note 106.

[219] See c. 5 below.

[220] The term "writ proceedings" as used in the *Civil Enforcement Act*, *supra* note 19, is too narrow for our purpose. It is defined in s. 1(1)(mm) to mean "any action, step or measure authorized by this Act to be taken for the purpose of enforcing a money judgment." The definition excludes prejudgment remedies as well as processes authorized by some other Act or by the common law.

C. Appropriate Limits to the Exemption

1. The exemption should apply to RRSPs, DPSPs and RRIFs as defined in the *Income Tax Act*

[166] The *ULCC Uniform Bill*[221] defines the terms RRSP, DPSP and RRIF by reference to their definitions in the *Income Tax Act*. For example, s. 2 provides:

> "DPSP" means a deferred profit sharing plan as defined in section 147 of the federal Act.

Section 2 defines RRSP and RRIF similarly, although referring to different sections. "Federal Act" is further defined in s. 2 as meaning the *Income Tax Act* (Canada). The Saskatchewan *Registered Retirement Plans Exemption Act*[222] uses similar definitions.

[167] The comment to s. 2 of the *ULCC Uniform Bill* says:

> The *Income Tax Act* (Canada) is used as the key for the various definitions to ensure ongoing consistency with that legislation. Some jurisdictions may need to add "as amended from time to time" to the definition "federal Act" if this is not covered by their *Interpretation Act*.[223]

In Alberta, s. 31 of the *Interpretation Act*[224] provides that, in an enactment, a citation of or reference to another enactment, including a federal statute, is a citation of or reference to the other enactment as amended. Therefore the words "as amended from time to time" are not needed.

[168] The definitions proposed by the ULCC and adopted in Saskatchewan seem appropriate for our proposed exemption section in Alberta. RRSPs, DPSPs and RRIFs are creations of the *Income Tax Act* and will be amended over the years. We see no reason to depart from these definitions.

RECOMMENDATION No. 2
The terms RRSP, DPSP and RRIF should be defined by reference to their definitions in the *Income Tax Act*.

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[221] *Supra* note 5 at 168-169.

[222] *Supra* note 8, s. 2.

[223] *Supra* note 5 at 169.

[224] R.S.A. 2000, c. I-8.

2. The exemption should apply to RRSPs, DPSPs and RRIFs only while they maintain their status under the *Income Tax Act*

[169] A proposal to exempt RRSPs, DPSPs and RRIFs creates the fear that an unscrupulous debtor will abuse the exemption to hide assets from the creditors. The ULCC proposed as one limitation on abuse that the exemptions from enforcement and garnishment should cease to exist if the plan ceases to be an RRSP, DPSP or RRIF for the purposes of the *Income Tax Act*. "Insofar as abuse of the exemption remains a particular concern for most respondents, this restriction was viewed as an appropriate method of targeting the exemption through utilization of the existing legislative framework."[221] The idea was criticized by the Canadian Insolvency Practitioners Association because it would require estate administrators of the bankruptcy process to continue after the date of the bankruptcy to monitor the tax status of the RRSP. This objection would have less force in the judgment enforcement system where, if the plan lost its tax deferral status, the creditor could then issue an instruction to seize or a garnishee summons.[222] In our view, this limitation on the exemption fits with our goal to exempt retirement savings plans registered as such under the *Income Tax Act*. The Saskatchewan *Registered Retirement Plans Exemption Act* defines RRSPs, DPSPs and RRIFs by incorporating the definitions in the *Income Tax Act*.[223] If a particular retirement savings agreement is not a plan for the purposes of the *Income Tax Act*, it is not for our purposes either.

[170] It has been suggested that the exemption should apply only to legal contributions to the RRSP but should not extend to overcontributions or to transfers to the plan of assets which are not permitted in an RRSP. Our understanding is that such overcontributions or improper transfers do not necessarily result in the deregistration of the plan. They would not be caught by Recommendation 3 and would be exempt.

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[221] *ULCC Consultation Report*, *supra* note 5 at 259.

[222] See also the suggestion in the comments to Issue 3(a) that the exemption could be made not to apply to contributions prohibited by the *Income Tax Act*, *supra* note 6, such as (1) overcontributions exceeding the taxpayer's annual limit, and (2) transfers to a self-directed plan of assets which one cannot put into an RRSP.

[223] *Registered Retirement Plans Exemption Act*, *supra* note 8, s. 2.

[171] We have decided not to amend Recommendation 3 to make exigible the percentage of the plan which represents such illegal transfers and contributions. The penalties for overcontributions and prohibited transfers are sufficiently severe that a debtor is unlikely to make them as a debt avoidance device. We also have some trouble understanding how a court or a bankruptcy trustee would apply such a refined rule. Suppose that a debtor overcontributes to his or her plan at various times during the life of the plan. What percentage of the plan and of the interest earned on the contributions is exempt and what is exposed to enforcement? The same difficulty arises with a plan composed partly of permitted and partly of prohibited assets. How do we decide which part of the plan's present value is exempt? The calculations become so complex and uncertain that they defeat our goal of creating an exemption which is simple and easily applied by trustees, lawyers and judges.

RECOMMENDATION No. 3

The exemption in recommendation 1 should cease to exist if the RRSP, DPSP or RRIF ceases to be an RRSP, DPSP or RRIF for the purposes of the *Income Tax Act*.

CHAPTER 4. OTHER ISSUES

A. Insurance and Non-Insurance RRSPs, DPSPs and RRIFs Should be Subject to the Same Exemption Provision

[172] In chapter 3, we concluded that RRSPs, DPSPs and RRIFs, and obligations to pay money from such plans, should be completely exempt from all creditors' remedies.[75] We did not deal expressly with the application of our proposed exemption to insurance products, although our decision turned in part on the close similarity of future income plans, whether sold by insurance or non-insurance providers.

[173] In our view, insurance and non-insurance RRSPs, DPSPs and RRIFs should be subject to the same exemption provision. From the beginning of this project to now, the overwhelming consensus among consultants has been that such plans, whether offered by insurance and non-insurance providers, are so similar that a disparity in exemptions is unfair and unreasonable, especially when we take into account the exempt status of most pensions. The history of this market is that insurance and non-insurance vendors have continued to develop plans which copy those of other vendors. The Institute has not heard any defence of the difference in treatment of insurance and non-insurance products. Assets without any relevant difference should be subject to the same exemption.

> **RECOMMENDATION No. 4**
> **RRSPs, DPSPs and RRIFs should be subject to the same exemption, whether the plans are sold by insurance or non-insurance vendors.**

B. Should the Exemption Provision be Located in the *Civil Enforcement Act*, the *Insurance Act* or in Both Statutes?

[174] Once it is concluded that insurance and non-insurance products should be subject to the same exemption provision, the next question is where this new provision should be. A complicating factor is that the life insurance provisions of

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[75] Recommendation 1.

the *Insurance Act* are based on the *Uniform Life Insurance Act*, an early example of a uniform Canadian statute. Two organizations representing the life insurance industry advised us that the exemption provisions in the *Insurance Act* should not be amended by any new exemption of non-insurance products. On the other hand, the Task Force proposed that its exemption override provincial insurance legislation.[229] The exemption against enforcement in s. 3 of the Saskatchewan *Registered Retirement Plans Exemption Act*[230] applies "notwithstanding any provision in any other Act or law" including, one assumes, the *Saskatchewan Insurance Act*.[231] The *Registered Retirement Plans Exemption Act* is less clear on the relationship of the two statutes as to money payable.[232]

[175] For the following discussion, it is necessary to quote again ss. 555, 575 and 580 of the Alberta *Insurance Act*:[233]

> Annuity deemed life insurance
>
> 555 For the purposes of this Subpart, an undertaking entered into by an insurer to provide an annuity, or what would be an annuity except that the periodic payments may be unequal in amount, is deemed to be and always to have been life insurance whether the annuity is for
>
> (a) a term certain,
>
> (b) a term dependent either solely or partly on a human life, or
>
> (c) a term dependent solely or partly on the happening of an event not related to a human life.
>
> Irrevocable designation
>
> 575(1) An insured may in a contract or by a declaration, other than a declaration that is part of a will, filed with the insurer at its head or principal office in Canada during the lifetime of the person whose life is insured designate a beneficiary irrevocably, and in that event the insured, while the beneficiary is living, must not alter or revoke the designation without the consent of the beneficiary and the insurance money is not subject to the

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[229] *Task Force Report*, *supra* note 10 at 21, 23.

[230] *Supra* note 8.

[231] *Supra* note 101.

[232] S. 4 of the *Registered Retirement Plans Exemption Act*, *supra* note 8, which makes "payments" from plans attachable, operates "notwithstanding any other Act." However, s. 5, which contains the partial exemption, does not have the "notwithstanding" proviso.

[233] *Supra* note 2. Ss. 574, and 576 to 579, which also deal with exemptions and other matters, are less significant to this discussion.

control of the insured or of the insured's creditors and does not form part of the insured's estate.

(2) When the insured purports to designate a beneficiary irrevocably in a will or in a declaration that is not filed as provided in subsection (1), the designation has the same effect as if the insured had not purported to make it irrevocable.

Insurance money not part of estate

580(1) When a beneficiary is designated, the insurance money, from the time of the happening of the event on which the insurance money becomes payable, is not part of the estate of the insured and is not subject to the claims of the creditors of the insured.

(2) While a designation in favour of a spouse or adult interdependent partner, child, grandchild or parent, or any of them, of a person whose life is insured is in effect, the insurance money and the rights and interests of the insured in the insurance money and in the contract are exempt from writ proceedings.

[176] The quoted sections from the *Insurance Act* are, not surprisingly, directed to insurance products. They could not be extended to non-insurance plans without substantial redrafting of ss. 575 and 580 to remove the specific references to insurance. The exemption provisions in the *Insurance Act* also apply to ordinary life insurance policies, as well as annuities and other instruments which are not RRSPs, DPSPs and RRIFs. The exemption of life insurance policies, annuities and other life insurance products is not an issue in this report unless those products take the form of RRSPs, DPSPs and RRIFs.

[177] In our view, the proposed exemption of RRSPs, DPSPs and RRIFs should be added to the *Civil Enforcement Act* and should apply notwithstanding s. 580(2) of the *Insurance Act*. The intention is to create one new exemption section to apply to both insurance and non-insurance RRSPs, DPSPs and RRIFs and to be located in the *Civil Enforcement Act*. The proposed exemption will modify s. 580(2) of the *Insurance Act* only as to RRSPs, DPSPs and RRIFs and only as to exemptions. The *Insurance Act* exemptions remain in force and unmodified as to all other insurance products that fall within them now, such as annuities.

[178] Our proposed exemption section is intended to override s. 580(2) of the *Insurance Act* as to exemptions only and not as to other rights or protections created by the Act. For example, s. 575 provides that an insured can designate a beneficiary irrevocably. The result is that the insured cannot alter or revoke the

designation without the beneficiary's consent, and the insurance money is not subject to the control of the insured. It is not our intention to affect the designated beneficiary's rights.

[179] We do not favour the creation of two similar or identical exemption provisions, one in the *Insurance Act* and the second in the *Civil Enforcement Act*. The danger is that, over time the sections will drift away from each other, leading to the present situation of one rule for insurance products and a different rule for the rest. This possibility would defeat our goal to create one exemption for all RRSPs, DPSPs and RRIFs.

[180] We are aware of the desire to maintain the uniformity of insurance statutes across Canada. We do not propose an amendment to the *Insurance Act*, but we do want RRSPs, DPSPs and RRIFs to be subject to uniform exemptions. There is little discernible difference between insurance and non-insurance future income plans, and this close similarity means that they should be subject to the same exemption. Uniformity of legislation cannot justify the grotesque disparity in exemptions of insurance and non-insurance products which are essentially the same. We note that our proposed exemption will be broader and will include more plans than the present *Insurance Act*. We conclude that our proposal of one exemption section in the *Civil Enforcement Act* which will override s. 580(2) of the *Insurance Act* only as to the exemption of RRSPs, DPSPs and RRIFs will accomplish our objective with minimum impact.

[181] We have considered whether the new exemption should be enacted as part of the *Civil Enforcement Regulation*. The difficulty is that the proposed exemption is intended to override other legislation such as the *Insurance Act*. The preferred and perhaps the only way to accomplish this result is to put the exemption provision in the *Civil Enforcement Act* rather than the *Civil Enforcement Regulation*. The same result could be accomplished by parallel regulations under the *Civil Enforcement Act* and the *Insurance Act*, but the danger is that the sections would diverge over time, leading to the injustice of differing exemption provisions for what are similar assets. We prefer that the new exemption be in the *Civil Enforcement Act* and that it override other legislation.

RECOMMENDATION No. 5
The new section exempting RRSPs, DPSPs and RRIFs should be part of the *Civil Enforcement Act* and should apply notwithstanding s. 580(2) of the *Insurance Act*.

C. Should Limits on the *Insurance Act* Exemptions be Overridden by the New *Civil Enforcement Act* Exemption?

[182] If the *Insurance Act* exemptions for RRSPs, DPSPs and RRIFs are replaced with a new exemption section in the *Civil Enforcement Act*, we need to ask if any of the limits to the exemptions created by the *Insurance Act* should be incorporated into the new exemption. Several problems arise.

1. Should the new *Civil Enforcement Act* exemption section require that an exempt RRSP or similar plan contain an undertaking to provide an annuity?

[183] Section 580 is currently limited to plans which fit within s. 555, that is, they must contain "an undertaking entered into by an insurer to provide an annuity, or what would be an annuity except that the periodic payments may be unequal in amount." It is doubtful whether all RRSPs, DPSPs and RRIFs contain such an undertaking. In any event, we do not believe that any new exemption provision should be so limited.

2. Should the new *Civil Enforcement Act* exemption section eliminate specific references to insurance?

[184] Subsection 580(2) exempts "the insurance money and the rights and interests of the insured in the insurance money and in the contract." Apart from the difficulties the courts have encountered in interpreting this language, the references to insurance need to be replaced in our new exemption section which applies to insurance and non-insurance RRSPs, DPSPs and RRIFs.

3. Should the new *Civil Enforcement Act* exemption section limit the exemption to plans which name a beneficiary?

[185] Subsection 580(2) is limited to plans which designate a beneficiary who is "a spouse or adult interdependent partner, child, grandchild or parent, or any of them." This provision makes sense in an insurance statute where beneficiaries are essential. The Institute is told that the overwhelming majority of insurance and

non-insurance RRSPs, DPSPs and RRIFs designate beneficiaries, and it is probably prudent to do so. But is there any need for creditor-debtor law to require a beneficiary for an exemption to exist? We think that the answer is no.

[186] The policy underlying our exemption proposals is that, while the debtor is alive, his or her savings for retirement should be protected. Whether or not the plan names a beneficiary is irrelevant to this goal, although it may be vital to proper financial and estate planning. We do not see why the existence or not of an exemption intended to protect retirement savings should turn on whether the debtor filled in the line naming a beneficiary. The parties to an RRSP, DPSP or RRIF should be free to decide whether or not to designate a beneficiary without that decision affecting the exempt status of the plan. The requirement to name a beneficiary is a trap for the unwary and should be omitted.

[187] It was suggested that the elimination of the requirement to name a beneficiary could have unexpected consequences for fraudulent conveyance and preference claims. At present, when a debtor on the eve of insolvency changes a non-exempt asset to an insurance RRSP, the new plan must name a beneficiary. It is arguable that such a naming constitutes a conveyance which can be challenged under the *Statute of Elizabeth*[234] or the *Fraudulent Preferences Act*.[235] If the requirement to name a beneficiary is eliminated, the crafty debtor can in theory accomplish the "transfer" without fear that it will be challenged as a fraudulent conveyance or preference.

[188] We have considered this objection to our proposal but do not see it as a reason to retain the beneficiary requirement. All that our proposal does is to make a future income plan exempt, whether or not it names a beneficiary. Our proposal does not forbid the naming of a beneficiary, and we expect the majority of such plans will do so. The situation is unlikely to arise very often. More fundamentally, if the law of reviewable transactions defines too narrowly the category of transactions which can be challenged, this is an issue for reviewable transactions

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[234] *Supra* note 17.

[235] R.S.A. 2000, c. F-24.

law as a whole. The Institute is considering whether to embark on a full scale examination of the law of fraudulent conveyances and preferences. The issue identified above should be part of that larger study. Its resolution should apply to all changes of property from non-exempt to exempt form, not just to the narrow class of assets under consideration here.

RECOMMENDATION No. 6
The new *Civil Enforcement Act* section exempting RRSPs, DPSPs and RRIFs
(a) should exempt an RRSP, DPSP or RRIF, whether or not it contains an undertaking to provide an annuity;
(b) should eliminate specific references to insurance; and
(c) should exempt an RRSP, DPSP or RRIF, whether or not it names a beneficiary.

D. Should the Proposed Exemptions for RRSPs and RRIFs Extend to Locked-In Retirement Accounts (LIRAs), Life Income Funds (LIFs) and Locked-In Retirement Income Funds (LRIFs) and Sums Payable from Such Plans?

[189] In Recommendation 2, we proposed that the terms RRSPs, DPSPs and RRIFs as used in our proposed exemption should follow the definitions in the *Income Tax Act*. A problem arises with a group of plans developed to house the proceeds of pensions terminated before retirement date. The plans to be examined in this section are locked-in retirement accounts (LIRAs), life income funds (LIFs), and locked-in retirement income funds (LRIFs). They need some explanation.

[190] When an employee in a pensionable job terminates the employment before retirement, he or she has choices about the money in the pension plan. The employee may (1) leave the money in the plan, (2) transfer it to the new employer's pension plan (depending on the terms of the two plans), (3) purchase an annuity from an insurance company, or (4) buy a LIRA. What the employee

cannot (usually) do is take the balance as cash or transfer it into an RRSP which is not locked in.[236]

[191] Assuming that the employee makes the most popular choice and purchases a LIRA, the employee may, at a date usually prescribed by the original pension plan, move the money from the LIRA into a LIF or an LRIF, both of which permit withdrawals of money. Most commentators regard LIRAs as RRSPs, and LIFs and LRIFs as types of RRIF. If this were the whole story, the Institute report could propose that RRSPs be defined to include LIRAs, and RRIFs be defined to include LIFs and LRIFs. The locked-in plans are close enough to the usual RRSP or RRIF to merit the same treatment in judgment enforcement law.

[192] The matter is complicated, however, by pensions legislation which regulates LIRAs, LIFs and LRIFs.[237] Alberta pension statutes contain exemption sections which may apply to such plans. Everyone we talked to assumed that LIRAs, LIFs, LRIFs and money payable from such plans are exempt from creditors' remedies. However, as we reviewed Alberta pensions legislation, we became struck by the incomplete, uncertain and inadequate nature of exemptions in the Alberta statutes.[238]

[193] The exemptions for pensions are complex, scattered through statutes, regulations and even contractual provisions. They suffer from several defects, the most important of which is that they do not clearly exempt from creditors' remedies LIRAs, LIFs and LRIFs or money payable therefrom. Whether such plans are exempt from enforcement is not usually a significant question because the creditor will seize the plan subject to its locked-in character. In other words, if the plan corpus cannot be withdrawn by the debtor, it equally cannot be withdrawn

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[236] The locking-in rules applicable to LIRAs, LIFs and LRIFs under the *Employment Pension Plans Act*, *supra* note 32, have recently been relaxed. See *Employment Pension Plans (Financial Hardship Withdrawal - 2003) Amendment Regulation*, *supra* note 68.

[237] See discussion *supra* note 69.

[238] This criticism is not original. Springman and Gertner, *supra* note 58, think that pensions exemption sections will be interpreted liberally by the courts. Some of our consultants thought that amendment of the exemption sections in Alberta pension statutes might be necessary.

by the creditor or civil enforcement agency. What is of more practical importance is whether money payable from such plans is exempt. In our view, Alberta pensions legislation does not clearly say that such obligations are exempt, and it should do so.

[194] Our conclusion is that the exemption of LIRAs, LIFs and LRIFs should be included in the Institute's general proposals for amendments to the *Civil Enforcement Act*. We therefore propose that:

(1) the term RRSP in the *Civil Enforcement Act* be defined to include LIRAs;
(2) the term RRIF in the same Act be defined to include LIFs and LRIFs; and
(3) the section in the *Civil Enforcement Act* exempting RRSPs, DPSPs and RRIFs should expressly apply notwithstanding the *Public Sector Pension Plans Act*, the *Teachers' Pension Plans Act*[239] and s. 85 of the *Employment Pension Plans Act*.

The effect of our proposals is to override the exemption sections of Alberta pensions statutes and regulations as to LIRAs, LIFs and LRIFs.

[195] It would be possible to do nothing about LIRAs, LIFs and LRIFs in the Institute's proposed amendments except to flag the problem for future study. The effect would be that LIRAs, LIFs and LRIFs might be exempt under pension legislation *and* under the *Civil Enforcement Act*, although the exemptions would likely be different. This is not a happy solution for courts and trustees who need as clear an answer as possible on exemption issues. A court faced with competing exemption sections must choose the one which applies, a difficult and uncertain choice in the case of vague pensions exemption sections, and a specific and later *Civil Enforcement Act* section.[240] It seems better to make that choice in the legislation now.

[196] In Recommendation 5, we proposed that the new section exempting RRSPs, DPSPs and RRIFs should be part of the *Civil Enforcement Act* and should apply notwithstanding s. 580(2) of the *Insurance Act*. If we define RRSPs, DPSPs and

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[239] R.S.A. 2000, c. T-1.

[240] Cf. *Tennant v. Tennant* (2002), 62 O.R. (3d) 185 (C.A.).

RRIFs to include LIRAs, LIFs and LRIFs, this new exemption will override existing exemption sections in Alberta pensions statutes and regulations as to LIRAs, LIFs and LRIFs.

RECOMMENDATION No. 7
(1) The term RRSP in our proposed exemption should be defined to include locked-in retirement accounts (LIRAs).
(2) The term RRIF in our proposed exemption should be defined to include life income funds (LIFs) and locked-in retirement income funds (LRIFs).
(3) The new section exempting RRSPs, DPSPs and RRIFs should apply notwithstanding the *Public Sector Pension Plans Act*, the *Teachers' Pension Plans Act* and section 85 of the *Employment Pension Plans Act*.

E. Should the Exemption Legislation be Proclaimed Immediately or Should it be Delayed after Passage?

[197] It is possible that some creditors extend credit, loan money or commence lawsuits in part because the debtor has a large and exigible RRSP, DPSP or RRIF. The Institute has been told that most creditors do not intend to realize against such retirement plans, but a few may. Such creditors may complain if an exemption of such plans is created and implemented without adequate notice so that the creditors can seek further security or reconsider their plans to litigate.

[198] The ULCC asked its consultants whether a new exemption of RRSPs and similar plans should be made to apply only to "new debt," apparently meaning debt incurred after the passage and proclamation of the new exemption. Some of the consultants who considered the issue were unhappy with this idea. They stressed the need for simplicity and clarity in the law, and preferred that the exemption should apply to all debts and all RRSPs, DPSPs and RRIFs, whether created before or after the passage and proclamation of the exemption.

> Notwithstanding the risk to existing or potential judgment creditors, there was a preference expressed for having the exemption apply to all debt, all RRSPs and DPSPs following a prolonged delay for a well publicized

> proclamation date that would allow potentially affected creditors the time to make informed decisions.[241]

The ULCC observed that the decision on this issue "would appear to turn largely on an assessment of the number of creditors, particularly accidental creditors, who may not have commenced existing legal actions had they known that RRSP and DPSP funds would not be exigible, and on the proposed duration of an advance publication of the change."[242]

[199] The ULCC recommended that the exemption apply to all debt and to all RRSPs and DPSPs with the proclamation date for the legislation publicized well in advance.[243] The 1999 ULCC report accompanying the uniform bill affirmed this decision, but concluded that no special transition provision was required in the bill. The Saskatchewan *Registered Retirement Plans Exemption Act*,[244] based on the *ULCC Uniform Bill*, was enacted on May 30, 2002. Section 6 of the Act provided that it was to come into force on proclamation; it was proclaimed in force on March 4, 2003.

[200] The Task Force thought that "many banks and other lenders have advanced credit on the strength of the debtor's asset base which includes non-exempt RRSPs."[245] The Task Force therefore proposed "a sufficient lead time between the passage of the proposed exemption provisions and their in-force date."[246] By "sufficient," the Task Force meant two or three years.

[201] The Institute in its consultation memorandum asked for help on the factual question whether there are creditors who would be adversely affected by the creation of an exemption. The Institute asked consultants whether credit granters

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[241] *ULCC Consultation Report*, *supra* note 5 at 262.

[242] *Ibid.* at 268-269.

[243] *Ibid.* at 270.

[244] *Supra* note 8.

[245] *Task Force Report*, *supra* note 10 at 22.

[246] *Ibid.* at 22, 24.

rely on borrowers having exigible or garnishable RRSPs, DPSPs and RRIFs. Our feedback suggested that most creditors do not rely on enforcement against future income plans to decide whether or not to extend credit. Some respondents nevertheless thought that a one or two year delay in promulgation would be desirable.

[202] Our conclusion is that the legislation should not be delayed artificially after passage but should come into force upon Royal assent. In our view, the creation of an exemption for non-exempt RRSPs, DPSPs and RRIFs corrects an injustice in the present law. It is unjustifiable to permit this injustice to continue longer than necessary. The normal legislative process has built-in delays which will give critics of the proposal ample time to make representations to the government, if they have not already commented on this report. We reject completely the distinction between new and old debt which was considered but ultimately rejected by the ULCC. The new exemption provision should apply to all debt, old or new, and should come into force on assent.

[203] However, we propose one limit to the above proposal. Creditors may have sued their debtors and commenced enforcement processes against RRSPs, DPSPs and RRIFs. It is unfair to such creditors to have the rules changed half way through. This is retroactive legislation which is rejected by most governments, including Alberta. We therefore propose that the new exemption should not apply to an enforcement process commenced against an RRSP, DPSP or RRIF before this provision comes into force.

RECOMMENDATION No. 8
(1) The new exemption provision should come into force upon Royal assent.
(2) The new exemption provision should not apply to an enforcement process commenced against an RRSP, DPSP or RRIF before the date of Royal assent.

F. Transfers From One Registered Plan to Another

[204] Owners of registered plans often transfer funds or property from one future income plan to another. If money or property is withdrawn from a plan, it is likely not exempt until it is safely deposited to the second plan. This problem has been addressed in the *ULCC Uniform Bill*[247] and in the Saskatchewan *Registered Retirement Plans Exemption Act*.[248] We need to consider the issue here.

[205] A depositor may effect a transfer of funds or property in at least two ways. The depositor may direct the first plan to transfer the funds or property directly to the second plan without the depositor receiving anything. Secondly, the depositor may close the first plan, receive the funds or property, and later open a second plan and deposit the funds or property into the new plan. Most depositors transfer money or property directly from one plan to another because no tax is assessed on such a transfer.[249] The depositor signs a T2033 federal government transfer form and the trustee sends the funds to the new trustee with no tax withheld. If the depositor follows the second course and collapses the first plan, then tax will be withheld. Even if the depositor wishes to place the proceeds in a new RRSP, he or she will be limited to the amount which can be deposited under the maximum annual contribution limit. One consultant told us that 99.9% of people transferring from one RRSP to another will do so directly.

[206] The *ULCC Uniform Bill* appears to address the first but not the second type of transfer. Section 4 provides:

> (1) Subject to section 5 but notwithstanding any other Act or regulation, a payment out of a registered plan to a planholder or the legal representative of a planholder is not exempt from any enforcement process.
>
> (2) For the purposes of subsection (1), a transfer of property held in one registered plan to another registered plan does not constitute a payment out of a registered plan.

The comment to s. 4(2) says:

> Subsection 4(2) is intended to clarify that a simple transfer from one registered plan to another does not constitute a "payment out" which would

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[247] *Supra* note 5.

[248] *Supra* note 8.

[249] *Income Tax Act*, *supra* note 6, s. 146(16).

> expose such transferred funds to enforcement proceedings. It should be noted that the extension of protection in subsection (2) is limited only to other "registered plans" and does not include other tax deferral instruments such as education or home purchase plans. This is intended to reflect the overall policy direction that this exemption from exigibility be targeted solely for retirement funds and not for other tax deferral or lifestyle choices.[250]

One assumes that the "simple transfer" spoken of is a transfer of funds (but perhaps not property) directly from one registered plan to another.

[207] Sections 4(1) and (2) of the Saskatchewan *Registered Retirement Plans Exemption Act* are almost identical with the above quoted sections from the *ULCC Uniform Bill*. However the Saskatchewan Act adds a new subsection:

> (3) A transfer of property held in one registered plan to another registered plan does not constitute a fraudulent or preferential transfer under *The Fraudulent Preferences Act*.[251]

[208] In our view, the new exemption should extend to direct payments or direct transfers of funds or property from one registered plan to another. The intention is clearly not to transfer property to the debtor but to continue the retirement saving scheme, albeit with a new plan or depository. The *Income Tax Act* singles out this kind of transfer as being tax-free. It is difficult to see how the direct transfer of property or funds between registered plans can result in a dishonest advantage to the debtor as the property will not be in the debtor's hands. This recommendation is an exception to our approach of not altering general rules of judgment enforcement law, but it seems justified in these narrow circumstances.[252]

[209] On the other hand, we do not believe that there should be any extension of the exemption where the depositor withdraws money from a registered plan and holds it with perhaps an intention of depositing the money into a new plan. The difference is that the debtor now has the plan funds or property in his or her possession and is free to use them for any purpose. Even if the funds were exempt for, say, 60 days, such an exemption

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[250] *ULCC Uniform Bill*, *supra* note 5 at 169-170.

[251] *Supra* note 8.

[252] The proposal proceeds on the assumption that, when money or property is transferred from one registered plan to another, the depositor acquires by virtue of the transfer some new property right which is exigible or garnishable. The assumption is debatable. To be safe, however, we think the legislation ought to make clear that such transfers are within the exemption.

would essentially give the debtor carte blanche to withdraw money or property from the registered plan and dissipate it without regard to retirement. If the intention behind our exemption proposal is to protect retirement savings, then that exemption cannot extend to funds or property which the debtor is free to use for any purpose. Our refusal to alter general principles of creditors' remedies law reinforces our conclusion.

[210] We do not propose anything like the provision in s. 4(3) that such transfers are not fraudulent or preferential transfers. This is an issue which should be addressed in the larger fraudulent conveyance and preference study which the Institute hopes to undertake soon.

RECOMMENDATION No. 9

The new exemption provision should extend to direct payments or direct transfers of funds or property from one future income plan to another as permitted by the *Income Tax Act*.

PART IV — DRAFT LEGISLATION

Civil Enforcement Amendment Act

(1) The *Civil Enforcement Act* is amended by this Act.

(2) The following is added after section 92:

Exemption of registered plans

92.1(1) In this section,

(a) "current obligation or future obligation" means a current obligation or future obligation within the meaning of section 77;

(b) "DPSP" means a deferred profit sharing plan as defined in section 147 of the federal Act;

(c) "enforcement process" means writ proceedings, attachment orders under Part 3 and any other prejudgment and post-judgment remedies under any other enactment or law that may result in a money judgment, but does not include a remedy of a secured creditor enforcing the secured creditor's security;

(d) "federal Act" means the *Income Tax Act* (Canada);

(e) "plan holder" means

(i) with respect to a DPSP, an employee within the meaning of section 147 of the federal Act,

(ii) with respect to an RRIF, an annuitant as defined in section 146.3 of the federal Act, and

(iii) with respect to an RRSP, an annuitant as defined in section 146 of the federal Act;

(f) "registered plan" means a DPSP, an RRIF or an RRSP;

(g) "RRIF" means

(i) a registered retirement income fund as defined in section 146.3 of the federal Act, and

(ii) a retirement income arrangement as defined in the *Employment Pension Plans Act*;

(h) "RRSP" means

(i) a registered retirement savings plan as defined in section 146 of the federal Act,

(ii) a locked-in retirement account as defined in the *Employment Pension Plans Act*, and

(iii) any other account similar to the account referred to in subclause (ii).

(2) Property in a registered plan, including any current obligation or future obligation under the plan, is exempt from any enforcement process.

(3) An exemption under subsection (2) extends to a direct transfer of property from one registered plan to another registered plan.

(4) Notwithstanding section 92, section 47.1 of the *Trustee Act* applies on the death of a plan holder.

(5) This section does not apply to an enforcement process commenced against a registered plan before this section comes into force.

(6) If a provision of this section is inconsistent or in conflict with a provision of another enactment, the provision of this section prevails unless the other enactment expressly provides that it, or a provision of it, prevails notwithstanding this section.

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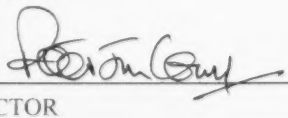

DIRECTOR

May 2004

APPENDIX A

List of Consultations

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Darcy McGovern, Crown Counsel; Legislative Services, Department of Justice, Government of Saskatchewan

Murdo McLeod, Director, Accounts Receivable Directorate; Canada Customs and Revenue Agency

Terry Melling, Prairie Regional Director; Investment Dealers Association of Canada

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Edward Rothberg, General Counsel; Canadian Association of Insurance and Financial Advisors

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Rick Solkowski, Executive Director; Consumer Services Branch, Alberta Government Services

Steven L. Shavers; Logan, Watson & Co.

Honourable Justice Frans F. Slatter; Court of Queen's Bench of Alberta

APPENDIX B

UNIFORM LAW CONFERENCE OF CANADA UNIFORM BILL

The Uniform Registered Plan (Retirement Income) Exemption Act

Short title

1. This Act may be cited as *The Uniform Registered Plan (Retirement Income) Exemption Act*.

Interpretation

2. In this Act:
"DPSP" means a deferred profit sharing plan as defined in section 147 of the federal Act;
"enforcement process" means attachment, garnishment, execution, seizure or other legal process for the enforcement of a debt;
"federal Act" means the *Income Tax Act* (Canada);
"planholder" means:
(a) with respect to a DPSP, a beneficiary within the meaning of section147 of the federal Act;
(b) with respect to an RRIF, an annuitant as defined in section 146.3 of the federal Act; and
(c) with respect to an RRSP, an annuitant as defined in section 146 of the federal Act;
"registered plan" means a DPSP, an RRIF or an RRSP.
"RRIF" means a registered retirement income fund as defined in section 146.3 of the federal Act;
"RRSP" means a registered retirement savings plan as defined in section 146 of the federal Act.

Comment: Section 2 contains the definitions for the Act. The *Income Tax Act* (Canada) is used as the key for the various definitions to ensure ongoing consistency with that legislation. Some jurisdictions may need to add "as amended from time to time" to the definition "federal Act" if this is not covered by their *Interpretation Act*.

Exemption from enforcement processes

3. Notwithstanding any other Act or regulation, all rights, property and interest of a planholder in a registered plan are exempt from any enforcement process.

Comment: Section 3 provides the central legal statement of this Act setting out that the contents of a "planholder's" "registered plan" are exempt from any legal process. This wording is absolute in its scope and subject only to the express exceptions set out within the Act itself. To the extent that individual jurisdictions wish to create further exceptions to this exemption, such as allowing exigibility to enforce maintenance orders, such exceptions would need to be added to this draft.

Payments out of registered plans

4.(1) Subject to section 5 but notwithstanding any other Act or regulation, a payment out of a registered plan to a planholder or the legal representative of a planholder is not exempt from any enforcement process.
(2) For the purposes of subsection (1), a transfer of property held in one registered plan to another registered plan does not constitute a payment out of a registered plan.

Comment: Subsection 4(1) sets out that while the contents of the registered plan are exempt, individual withdrawals or payments out of such a plan are not exempt subject to the provisions in section 5. Subsection 4(2) is intended to clarify that a simple transfer from one registered plan to another does not constitute a "payment out" which would expose such transferred funds to enforcement proceedings. It should be noted that the extension of protection in subsection (2) is limited only to other "registered plans" and does not include other tax deferral instruments such as education or home purchase plans. This is intended to reflect the overall policy direction that this exemption from exigibility be targeted solely for retirement funds and not for other tax deferral or lifestyle choices.

Enforcement against payments out

5. For the purposes of enforcing a creditor's rights against payments out of a registered plan to a debtor planholder:
(a) the amount of a payment out of the registered plan is deemed to be a debt due or accruing due to the person for or with respect to the person's wages or salary within the meaning of [*insert name of relevant statute*]; and
(b) the exemptions set out in [*insert section number(s) of that Act*] apply, with any necessary modification.

Comment: Section 5 is intended to provide a link to existing enforcement procedures in the implementing jurisdiction. Clause (a) deems a payment out of a registered plan to be subject to garnishment proceedings under the appropriate provincial legislation (in Saskatchewan for example, the appropriate reference is to *The Attachment of Debts Act*). Clause (b) creates limits on such proceedings by expressly providing that the provincial limits on the amount which can be garnisheed in a given situation should also apply in this situation (For example, see section 22 of *The Attachment of Debts Act*). Thus while section 4 provides that these payments are individually exigible, and clause 5(a) allows the payments to be accessed by garnishment proceedings, clause 5(b) is intended to ensure that subsistence levels are maintained for the planholder and that only the amount in excess of such provincial limits are exigible. This is viewed as consistent with the overall policy goal of ensuring adequate retirement funds for a plan holder but not protecting funds from legitimate creditors with respect to the portion of those funds that are in excess of this policy goal.

Coming into force

6. This Act comes into force on proclamation.

Comment: Section 6 provides that the Act comes into force on proclamation. It could also provide for [or on a specified future date]. The preference would of course be to have a uniform proclamation date across Canada in order to best reflect a new national approach to this issue. Consultations reflect that a period of approximately one year prior between passage of the Bill and proclamation would be sufficient time to allow affected parties to adjust to the proposed new regime.

**The "square-bracketed" provisions refer to *The Attachment of Debts Act* in the Province of Saskatchewan for illustration purposes. Each jurisdiction will, of course, refer to the appropriate equivalent legislation in their jurisdiction.

Section 22 of that Act provides as follows:

ATTACHMENT OF WAGES OR SALARY

Exemption from attachment

22(1) Subject to the other provisions of this section, no debt due or accruing due to an employee, for or in respect of wages or salary, is liable to attachment unless the debt exceeds the sum mentioned in subsection (2), and then only to the extent of the excess.

(2) The amount of an employee's wages or salary exempt from attachment in any month is $500 plus $100 for each of his dependants that he supports.

(3) For the purpose of subsection (2), "dependant" means:

(a) a wife, husband, brother, sister, parent or grandparent; or

(b) a person under the age of sixteen years; or

(c) a person being sixteen years of age or more who:

(i) is in regular attendance at a school; or

(ii) by reason of mental or physical disability is unable to earn a livelihood.

(4) An employer who has been served with a garnishee summons to attach wages due or accruing due to his employee may retain the amount of the wages of the employee that is exempt from attachment and pay that amount to the employee.

(5) If the plaintiff or judgment creditor claims that an employee, in addition to a fixed money wage or salary is given board or lodging or the use of a house, or any other thing of value, in part payment or compensation for his services, the plaintiff or judgment creditor may apply, on not less than five days' notice, to the judge for an order appraising the money value of the board or lodging, use of house or other thing, and the value thus ascertained shall be deducted from the amount of the exemption to which the defendant or judgment debtor would otherwise be entitled.

(6) In case of an attachment of wages or salary, the defendant or judgment debtor or plaintiff or judgment creditor may without awaiting the regular sittings of the court, apply to a judge, upon at least five days' notice in writing to the other party or his solicitor, for an order fixing the amount of exemption and finally disposing of the matter, and the judge may order accordingly.

(7) Where the debt due or accruing due is wages or salary for a period of less than one month, the part thereof exempt from attachment is that sum that bears the same proportion to the amount of the exemption allowed by subsections (2) and (5) as the period for which the wages or salary is due or accruing due bears to one month of four weeks.

(8) Nothing in this section applies to a garnishee summons issued under:

(a) Repealed. 1984–85–86, c.77, s.2.

(b) a judgment or order respecting:

(i) an action founded upon a separation agreement;

(ii) a debt contracted for board or lodging; or

(iii) hospital expenses payable to a hospital or recoverable by a municipality or by the Minister of Municipal Affairs under *The Local Improvement Districts Act* or *The Local Improvement Districts Relief Act*.

(9) If the amount of the exemption to which the defendant or judgment debtor is entitled, or a portion thereof, is paid into court, it is not necessary

for him to claim the amount or the portion, but he is entitled, in the absence of notice of an application under subsection (5) or subsection (6), to have it paid out to him at any time on application to the local registrar accompanied by an affidavit showing such facts as so entitle him.

(10) Where a defendant or a judgment debtor does not make an application under subsection (9) for payment out to him of the amount to which he is entitled and that has been paid into court, prior to the expiration of two months after the date:

(a) the amount is paid into court;

(b) judgment is recovered against the debtor;

whichever date is the later, the judgment creditor may, either ex parte or on such notice as the court or judge directs, apply to the court or a judge to have the amount, or so much of the amount as is sufficient to satisfy his judgment, paid out to him, and where an application is made the court or judge may make such order as is deemed advisable in the circumstances.

Historical Note: R.S.S. 1965, c. 101, s. 22; 1966, c. 93, s. 4; 1973, c. 5, s. 1; 1979, c. 4, s. 3; 1979-80, c. 2, s. 4; 1984-85-86, c. 77, s. 2.

APPENDIX C

REGISTERED RETIREMENT PLANS EXEMPTION ACT

CHAPTER R-13.01

An Act exempting Registered Retirement Plans
from certain Enforcement Processes

Short title

1 This Act may be cited as *The Registered Plan (Retirement Income) Exemption Act*.

Interpretation

2 In this Act:

"DPSP" means a deferred profit sharing plan as defined in section 147 of the federal Act; (« *RPDB* »)

"enforcement process" means attachment, garnishment, execution, seizure or other legal process for the enforcement of a debt; (« *exécution forcée* »)

"federal Act" means the Income Tax Act (Canada); (« loi fédérale »)

"planholder" means:

(a) with respect to a DPSP, a beneficiary within the meaning of section 147 of the federal Act;

(b) with respect to an RRIF, an annuitant as defined in section 146.3 of the federal Act; and

(c) with respect to an RRSP, an annuitant as defined in section 146 of the federal Act; (« *participant* »)

"registered plan" means a DPSP, an RRIF or an RRSP; (« *régime enregistré* »)

"RRIF" means a registered retirement income fund as defined in section 146.3 of the federal Act; (« *FERR* »)

"RRSP" means a registered retirement savings plan as defined in section 146 of the federal Act. (« *REER* »)

Exemption from enforcement processes

3(1) Subject to subsection (3) but notwithstanding any other Act or law, all rights, property and interests of a planholder in a registered plan are exempt from any enforcement process.

(2) Subsection (1) applies notwithstanding any provision in any other Act or regulation that states that the provision is to apply notwithstanding any other Act or law.

(3) Subsection (1) does not apply with respect to the enforcement of a maintenance order as defined in *The Enforcement of Maintenance Orders Act, 1997*.

Payments out of registered plans

4(1) Subject to section 5 but notwithstanding any other Act or law, a payment out of a registered plan to a planholder or the legal representative of a planholder is not exempt from any enforcement process.

(2) For the purposes of subsection (1), a transfer of property held in one registered plan to another registered plan does not constitute a payment out of a registered plan.

(3) A transfer of property held in one registered plan to another registered plan does not constitute a fraudulent or preferential transfer under *The Fraudulent Preferences Act*.

Enforcement against payments out

5 For the purposes of enforcing a creditor's rights against payments out of a registered plan to a debtor planholder:

(a) the amount of a payment out of the registered plan is deemed to be a debt due or accruing due to the person for or with respect to the person's wages or salary within the meaning of *The Attachment of Debts Act*; and

(b) the exemptions set out in section 22 of *The Attachment of Debts Act* apply, with any necessary modification.

Coming into force

6 This Act comes into force on proclamation.

APPENDIX D
INSTITUTE SUBMISSION TO THE SENATE STANDING COMMITTEE ON BANKING, TRADE AND COMMERCE

[The Institute was invited to make a submission to the Senate Standing Committee on Banking, Trade and Commerce on the exemption of future income plans. What follows is the submission presented to the Committee on September 18, 2003. We have omitted a chart comparing existing law reform proposals. An updated version of the chart appears in Appendix E. We also omit an appendix, drawn from chapter 2 of this report, setting out information on the law in some other Canadian jurisdictions.]

ALBERTA LAW REFORM INSTITUTE
EDMONTON, ALBERTA

SUBMISSION TO THE SENATE STANDING COMMITTEE ON BANKING, TRADE AND COMMERCE

EXEMPTION OF FUTURE INCOME PLANS

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September 18, 2003
Videoconference

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A. INTRODUCTION

1. Present Law

[1] Canadian law generally does not permit creditors to enforce their judgments against pensions, or against annuities and registered retirement savings plans issued by insurance companies. Pension statutes contain sections which protect pensions from enforcement. Insurance statutes do the same job for insurance products, including most annuities and RRSPs.[1] However, Canadian law usually does permit a judgment creditor to enforce a money judgment against the non-insurance RRSP of the debtor. The rules vary from province to province; in Alberta non-insurance future income plans are totally exposed to creditors' remedies.[2] There is an unfairness in this exposure of non-insurance RRSPs, compared to the virtually complete protection of insurance RRSPs and annuities, and most pensions.

[2] When pensions, insurance annuities, and RRSPs or RRIFs start to make payments to the depositor, the creditor's appropriate remedy is to attach the money obligation. Exemptions are again an issue. Most pension and insurance statutes expressly prohibit garnishment of benefits or money obligations. However, obligations to pay out of a non-insurance RRSP or RRIF (after tax is deducted) will be fully garnishable. Again, creditors' remedies law treats differently obligations which appear to be similar.

2. Alberta Law Reform Institute Project

[3] In September, 2001, the Alberta Law Reform Institute (the Institute) decided to conduct a project on the exemption of RRSPs, DPSPs and RRIFs in Alberta law. The Institute Board published a consultation memorandum in June, 2002;[3] it has

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[1] This submission uses abbreviations to identify registered retirement savings plans [RRSPs], deferred profit-sharing plans [DPSPs] and registered retirement income funds [RRIFs].

[2] On the other hand, Saskatchewan has recently created an extensive exemption of RRSPs, DPSPs and RRIFs. See *The Registered Plan (Retirement Income) Exemption Act*, S.S. 2002, c. R-13.01, proclaimed in force March 4, 2003 [*Registered Retirement Plans Exemption Act*]. For a discussion of the Saskatchewan Act, see C.R.B. Dunlop, "Should Creditors Have Access to Future Income Savings Plans?" (2003) 66 Sask. L. Rev. 279 [Dunlop, "Should Creditors Have Access to Future Income Savings Plans?"].

[3] Alberta Law Reform Institute, *Creditor Access to Future Income Plans*, Consultation Memorandum (continued...)

written and is about to publish its report on the exemption of future income plans. The report considers whether RRSPs, DPSPs, and RRIFs should be wholly or partly exempt from creditors' remedies. The report also reviews the exempt status of locked-in retirement accounts [LIRAs], life income funds [LIFs], and locked-in retirement income funds [LRIFs].

3. Plan for this Submission

[4] In the rest of this submission, we will do the following:

- summarize the Institute's final report on exemption of future income plans,
- list the Institute's recommendations,
- answer the question from the Senate Committee as to the distinction between insurance and non-insurance RRSPs, and
- compare in a table the similarities and differences between the Institute proposals and those of other reform agencies.

In Appendix A, we outline the law in some other Canadian jurisdictions.

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[1] (...continued)
No. 11 (Edmonton: Alberta Law Reform Institute, 2002) [ALRI, *Creditor Access to Future Income Plans*].

B. SUMMARY OF INSTITUTE REPORT ON EXEMPTION OF FUTURE INCOME PLANS

1. Saving for Retirement Should Be Encouraged by Our Legal System

[5] It is obvious that people who retire from their work need resources to survive, although recent studies make it clear that many Canadians have not saved enough to provide an adequate income during retirement.[4] In the future, people will need to take more responsibility for saving for their retirement. People live longer, and the fear of outliving one's savings has some basis in fact, especially if governments decide to weaken the safety net and medicare. In the ten years from 1990 to 2000, "private pensions," that is, registered pension plans and RRSPs, have become the largest single source of the total income of seniors, compared to Old Age Security, Canada and Quebec Pension Plans, investments and employment.[5] The trend since 1990 has been towards fewer pensionable jobs as a percent of the total available.[6] It is unrealistic for people to assume that they will be able to supplement their savings by working after retirement.[7]

[6] With the decline in pensionable employment, RRSPs have become an enormously popular way for people to save for retirement. However, the majority of cases have concluded that RRSPs and similar plans are exigible, and that

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[4] Statistics Canada, *The Assets and Debts of Canadians: Focus on Private Pension Savings* (Ottawa: Statistics Canada, 2001) at 23-35, online: <http://www.statcan.ca/english/freepub/13-595-XIE/9900113-595-XIE.pdf>.

[5] See Statistics Canada, "Canada's Retirement Income Programs," in Statistics Canada, *The Daily*, (Ottawa: Statistics Canada, Friday, February 14, 2003), online: <http://www.statcan.ca/Daily/English/030214/d030214a.htm> (last accessed March 21, 2003).

[6] "In 1999, 40% of the labour force put money into an RRSP, up from 32% at the start of the decade. In contrast, just one-third of the labour force contributed to a Registered Pension Plan in 1999, compared with 37% in 1991." See Statistics Canada, "Canada's Retirement Income Programs," *ibid.*

[7] In a recent survey of working and retired Canadians, 72% of non-retired people were strongly considering working in some capacity after they retired, a goal which might be frustrated as only 23% of retirees indicated that they were actually working. See Investors Group, Media Release, "Majority of Canadians Plan to Work During Retirement" (January 21, 2003), online: <http://www.investorsgroup.com/english/about_us/news_releases/2003/030121edns_work.htm>. The survey was sponsored by Investors Group and conducted by Decima Research. The figures differ across the country. Compare Statistics Canada, "General Social Survey: Social Support and Aging," in Statistics Canada, *The Daily*, (Ottawa: Statistics Canada, Tuesday, September 2, 2003).

obligations to pay money from such plans are garnishable.[8] Future income plans provided by insurance companies are exempt from creditors of the depositor where the plans fit within the limited exemption sections of insurance legislation. No such protection exists for non-insurance products in Alberta. Other provinces have adopted varying degrees of exemption protection for insurance and non-insurance future income plans.

2. Present Differences Between Insurance and Non-insurance Exemptions Are Inconsistent and Unjust

[7] Exemptions of life insurance have been traced back to the early nineteenth century and are common in *Insurance Acts* today.[9] The idea was originally to protect the widow and children of the deceased wage-earner, but the exemption provisions were soon extended to exempt the cash surrender value of policies, and to cover beneficiaries other than widows and children. In addition to life insurance policies, insurance companies have at least since Confederation sold annuities.[10] Whether annuities are fairly described as life insurance is a difficult issue, depending on the precise terms of the contract.[11] After the *Income Tax Act* was amended to give tax deferral status to RRSPs and similar plans, the insurance industry started to market such plans. Insurer and non-insurer vendors of retirement plans have tried to copy each other's products with the result that the insurance connection has become increasingly tenuous.[12]

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[8] The numerous cases, books and articles on the issue are cited in ALRI's *Creditor Access to Future Income Plans*, Consultation Memorandum No. 11, *supra* note 3, and in the final report to be published soon.

[9] C.R.B. Dunlop, *Creditor-Debtor Law in Canada*, 2d. ed. (Toronto: Carswell, 1995) at 495-496 [Dunlop, *Creditor-Debtor Law in Canada*].

[10] The history is described in *Re Coopérants, Mutual Life Insurance Society* (1993), 58 Q.A.C. 211; leave to appeal to S.C.C. refused (1994), 170 N.R. 79 (S.C.C.).

[11] Marvin G. Baer & James A. Rendall, *Cases on the Canadian Law of Insurance*, 6th. ed. (Scarborough, Ont.: Carswell, 2000) at 30-63; Edward A.J. Rothberg, "Life Insurance and Creditor Protection: Review and Update, 2000" (2000) 19 E.T.P.J. 269.

[12] Rothberg, *ibid.* at 285-286.

[8] When the courts held that annuities sold by insurance companies were not life insurance,[13] the *Uniform Life Insurance Act*, followed by all common law provinces, amended the definition of life insurance to include annuities or agreements to enter into annuities. For example, the Alberta *Insurance Act*[14] was amended in 1981 to provide that the term "life insurance" includes "an undertaking to provide an annuity, or what would be an annuity except that the periodic payments may be unequal in amount, for a term dependent solely or partly on a human life, and such an undertaking shall be deemed always to have been life insurance."[15] After some early uncertainty, the recent court decisions have read these extended definitions generously in cases where exemptions from creditors were at issue.[16] The effect of the amendments is to extend the exemption of life insurance to annuities, RRSPs and RRIFs, and to obligations to pay out of such plans, if they name the proper beneficiary and otherwise fit within the sections.

[9] The law in Alberta today is similar to that in most Canadian jurisdictions. Creditors are generally not able to enforce their judgments against annuities and RRSPs issued by insurance companies. However, non-insurance RRSPs can be taken by creditors under a writ of enforcement. When insurance annuities, RRSPs and RRIFs start to make payments to the depositor, exemptions again depend on who sells the retirement savings plan. Insurance legislation will generally exempt obligations to pay out of an RRSP or a RRIF. However, money obligations payable out of a non-insurance RRSP or RRIF (after tax is deducted) will be fully garnishable.

[10] Such distinctions are hard to explain. RRSPs, DPSPs and RRIFs are virtually indistinguishable from each other, yet the insurance product is totally exempt while the similar plan purchased from another vendor is completely exposed to creditors' remedies. No respondent to our consultation memorandum sought to defend

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[13] *Gray v. Kerslake* (1958), 11 D.L.R. (2d) 225 (S.C.C.).

[14] R.S.A. 1980, c. I-5.

[15] S.A. 1981, c. 49, amending s. 1(m.1) and adding s. 240.1 of the Act. On the amendment in 1981, see Michael J. McCabe, "Execution Against an R.R.S.P." (1990) 76 C.B.R. (N.S.) 218 at 227-228. See now *Insurance Act*, R.S.A. 2000, c. I-3, ss 554, 555, 575, and 580.

[16] The numerous cases, books and articles on the issue are cited in ALRI's *Creditor Access to Future Income Plans*, *supra* note 3, and in the final report to be published soon.

directly this apparent unfairness. If the products are virtually the same, it seems unjust and intolerable that they should be treated so differently in exemptions law. The injustice is more clear where employers offer private sector plans, like group RRSPs or DPSPs, as substitutes for or supplements to pensions. Such substitute plans serve much the same purpose as pensions but are not protected by pension exemption provisions.

3. Present Differences Between the Exemption of Pensions and Non-insurance RRSPs are Similarly Difficult to Justify

[11] Pension legislation usually exempts pensions and pension payments from creditors' remedies,[17] a situation which excited little criticism in our consultations. Pensions differ from insurance and non-insurance future income plans, including RRSPs, DPSPs and RRIFs. For example, pension funds are with exceptions locked in while individual RRSPs can almost always be collapsed by the depositor on payment of tax and any fees charged by the depository. The *Final Report* of the Personal Insolvency Task Force [Task Force][18] relied on these differences to restrict its proposed exemption to locked in RRSPs and RRIFs. We discuss the *Task Force Report* more fully below.

[12] In the Institute's view, however, the similarities of pensions and future income plans are more significant than the differences, We conclude that it is unfair for pensions to enjoy an exemption denied to non-insurance future income plans.

(1) Both pensions and future income plans are vehicles intended to hold savings which will generate retirement income. They serve the same social objectives and should be treated similarly in the law of creditors' remedies.

(2) Payments into both types of plans are given similar exempt status under the *Income Tax Act*. If the Canada Customs and Revenue Agency [CCRA] is prepared to treat them as alike, we do not understand why the exemptions should be different.

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[17] See e.g., *Employment Pension Plans Act*, R.S.A. 2000, c. E-8, s. 85.

[18] Personal Insolvency Task Force, *Final Report* (Ottawa: Industry Canada, 2002) at 17-24 [*Task Force Report*]. Online versions of the report can be found at <http://strategis.ic.gc.ca/pics/br/pitf.pdf> and <http://strategis.ic.gc.ca/SSG/br01221e.html>.

(3) While most future income plans are not locked in by operation of law or contract,[19] the taxpayer is deterred from withdrawing funds because of the resulting tax liability. Some commentators have described future income plans as being "de facto locked in" because of the tax consequences.

(4) Our proposed exemption is for future income plans or money payable from them. It does not extend to funds paid or property transferred out of a plan because those assets are no longer dedicated to retirement. Such funds or property should be available to the depositor's creditors. This rule is likely the law today as to pension payments, at least after they are deposited into the pensioner's bank account.[20] If the depositor collapses a future income plan and withdraws the funds, the plan ceases to be an RRSP, DPSP or RRIF as defined by the *Income Tax Act* and is therefore available to the creditors.

4. RRSPs, DPSPs AND RRIFs Should be Totally Exempt

[13] In our view, insurance and non-insurance RRSPs, DPSPs and RRIFs as defined in the *Income Tax Act*,[21] and obligations to pay money out of such plans, should be totally exempt from all judgment creditors' remedies.[22] No distinction should be drawn among remedies nor should the exemption be different between insurance and non-insurance products. Put simply, these assets, like pensions, are so similar and so essential to the survival of individuals that they should be completely protected from creditors.

[14] The arguments for this conclusion can be summarized as follows:

(1) The present patchwork of exemptions for pensions, insurance and non-insurance retirement income plans is incoherent and unjust.

(2) Canadian law recognizes saving for retirement as a value worthy of protection and encouragement.

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[19] Some group RRSPs are locked in by the contract between the employer and the participating employees.

[20] See *Toronto-Dominion Bank v. Grossman* (1982), 132 D.L.R. (3d) 566 (N.B.C.A.). See generally Dunlop, *Creditor-Debtor Law in Canada*, *supra* note 9 at 502-506.

[21] *Income Tax Act*, R.S.C. 1985, c. 1, (5th Supplement).

[22] The exemption should not apply to non-money claims or judgments based on property rights or on the enforcement of security taken on the future income plan, assuming such a security to be permitted by law.

(3) Pensions, insurance and non-insurance retirement income plans all serve the same purpose, saving for retirement, as evidenced by their common tax treatment. Pensions and insurance RRSPs are totally exempt. RRSPs, DPSPs and RRIFs are pension-substitutes and should enjoy the same exemption in creditor-debtor law, whether sold by an insurance provider or not.

(4) People save for retirement in various ways, but the *Income Tax Act* has singled out pensions, RRSPS, DPSPs and RRIFS as entitled to tax exemption. Where a future income fund does not fit the definition of RRSP, DPSP or RRIF in the *Income Tax Act*, it will not be exempt. If a plan which originally fit the definition ceases to do so, it will cease to be exempt.

(5) Pensions, RRSPs, DPSPs and RRIFs may not be necessary while the debtor is working but will be crucial to his or her survival during the years of retirement (and unemployment). Obligations to pay out of such plans are usually attached during retirement years when people are in a poor position to earn more money by working overtime, working a second job or finding a better job. Retirement is when the income is needed and cannot be replaced or supplemented. Any enforcement process that renders retirees destitute simply ensures that they will become the responsibility of the state.

(6) A substantial amount of capital is necessary to fund even a modest pension or retirement income.

(7) Many, perhaps most, debtors either have no RRSP or have long since cashed it in before their financial affairs collapse completely. The practical impact of a total exemption will be minimal in most situations.

(8) To some extent, creditors can protect themselves by exercising care in extending credit or delaying collection proceedings.

(9) RRSPs are often held by the self-employed and entrepreneurs. The proposed exemption encourages entrepreneurs to continue an economically beneficial activity which may entail risks unrelated to any wrongdoing.

(10) Viewed from the position of the consumer of these financial services, pensions and RRSPs serve the same purpose: saving for retirement. The consumer who works in a non-pensionable employment or in a business has no choice; he or she must save by using RRSPs in order to obtain the favourable tax exemption offered to pensions and RRSPs. These plans deserve similar exemptions because they serve the same social goal, to encourage people to accumulate retirement savings which will be increasingly essential in the future.

5. Exemption Restricted to RRSPs, DPSPs and RRIFs as Defined in the *Income Tax Act*

[15] The Uniform Law Conference of Canada (ULCC), in its 1998 report,[23] proposed as one limitation on abuse that the exemptions from enforcement and garnishment should cease to exist if the plan ceases to be an RRSP, DPSP or RRIF for the purposes of the *Income Tax Act*. We agree. This limitation fits with our goal to exempt retirement savings plans registered as such under the *Income Tax Act*. If a particular retirement savings agreement is not a plan for the purposes of the *Income Tax Act*, it is not for our purposes either.

6. Same Exemption for Insurance and Non-Insurance Plans

[16] We noted above our conclusion that RRSPs, DPSPs and RRIFs offered by insurance and non-insurance providers should be subject to the same exemption provision. Our recommendation is that the proposed exemption be added to the Alberta *Civil Enforcement Act*[24] and should apply notwithstanding any other act or law. The proposed exemption will override the Alberta *Insurance Act*[25] exemption sections only as to RRSPs, DPSPs and RRIFs and only as to exemptions. The *Insurance Act* exemptions remain in force and unmodified as to all other insurance products that fall within them now, such as annuities. We do not favour the creation of two similar or identical exemption provisions, one in the *Insurance Act* and the second in the *Civil Enforcement Act*. The danger is that, over time, the sections will drift away from each other, leading to the present situation of one rule for insurance products, and a different rule for the rest. This possibility would defeat our goal to create one exemption for all RRSPs, DPSPs and RRIFs.

[17] The new exemption provision in the *Civil Enforcement Act* will not include some of the limitations in the exemption sections of the *Insurance Act*. Because the new provision applies to insurance and non-insurance products, it should not include specific references to insurance or the requirement that the plan include an

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[23] Uniform Law Conference of Canada, *Proceedings of the Eightieth Annual Meeting* (Toronto: The Conference, August, 1998) at 254-273 [*ULCC Consultation Report*]; see also Uniform Law Conference of Canada, *Proceedings of the Eighty First Annual Meeting* (Toronto: The Conference, August, 1999) at 164-180 [*ULCC Uniform Bill*]. The ULCC website is helpful, online: <http://www.ulcc.ca/en/home/> (last accessed March 19, 2003).

[24] R.S.A. 2000, c. C-15.

[25] *Insurance Act*, *supra* note 15.

undertaking to provide an annuity. These limitations will continue in the exemption sections of the *Insurance Act* as to insurance products other than RRSPs, DPSPs and RRIFs.

[18] Section 580 of the Alberta *Insurance Act* is limited to plans which designate a beneficiary who is "a spouse, child, grandchild or parent, or any of them." (There are similar provisions in most Canadian life insurance legislation.) This provision makes sense in an insurance statute where beneficiaries are essential. The Institute is told that the overwhelming majority of insurance and non-insurance RRSPs, DPSPs and RRIFs designate beneficiaries, and it is probably prudent to do so. But is there any need for creditor-debtor law to require a beneficiary for an exemption to exist? We think that the answer is no. The policy underlying our exemption proposals is that, while the debtor is alive, his or her savings for retirement should be protected. Whether or not the plan names a beneficiary is irrelevant to this goal, although it may be vital to proper financial and estate planning. The requirement to name a beneficiary is a trap for the unwary and should be omitted.

7. Same Exemption for LIRAs, LIFs and LRIFs

[19] When an employee in a pensionable job terminates the employment before the normal retirement date, he or she has choices about the money in the pension plan.[26] The employee may (1) leave the money in the plan, (2) transfer it to the new employer's pension plan (depending on the terms of the two plans), (3) purchase an annuity from an insurance company, or (4) buy a LIRA. Assuming that the employee makes the most popular choice and purchases a LIRA, the employee may, at a date usually prescribed by the original pension plan, move the money from the LIRA into a LIF or a LRIF, both of which permit withdrawals of money. Most commentators regard LIRAs as RRSPs, and LIFs and LRIFs as types of RRIF. If this were the whole story, the Institute report could propose that RRSPs be defined to include LIRAs, and RRIFs be defined to include LIFs and LRIFs. The locked-in plans are close enough to the usual RRSP or RRIF to merit the same treatment in judgment enforcement law.

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[26] The law is contained in the pensions statutes of the various jurisdictions. For Alberta, see e.g. *Employment Pension Plans Act*, *supra* note 17.

[20] The matter is complicated, however, by pensions legislation which regulates LIRAs, LIFs and LRIFs. Alberta pension statutes contain exemption sections which may apply to such plans. As we reviewed Alberta pensions legislation, we became struck by the incomplete, uncertain and inadequate nature of exemptions in the Alberta statutes, especially as to money payable from such plans. We therefore propose that the exemption of LIRAs, LIFs and LRIFs should be included in the Institute's general proposals for amendments to the *Civil Enforcement Act*. The effect of our proposals is to override the exemption sections of Alberta pensions statutes and regulations only as to the exemption of LIRAs, LIFs and LRIFs.

8. Coming into Effect: Transition

[21] The new exemption legislation should not be delayed artificially after passage but should come into force upon Royal assent. The creation of an exemption for non-exempt RRSPs, DPSPs and RRIFs corrects an injustice in the present law which should not continue longer than necessary. The normal legislative process has built-in delays which will give critics of the proposal ample time to make representations to the government, if they have not already commented on the Institute's report. The new exemption provision should apply to all debt, old or new, and should come into force on assent.

[22] We propose one limit to the above proposal. Creditors may have sued their debtors, gone to judgment and commenced enforcement proceedings against RRSPs, DPSPs and RRIFs. It is unfair to such creditors who may have commenced expensive enforcement procedures against such assets to have the rules changed half way through. This is retroactive legislation which is rejected by most governments, including Alberta. We therefore propose that the new exemption should not apply to writ proceedings actually commenced against RRSPs, DPSPs and RRIFs before the date of enactment.

9. Transfers From One Registered Plan to Another

[23] Owners of registered plans often transfer funds or property from one future income plan to another. If money or property is withdrawn from a plan, it is likely not exempt until it is safely deposited in the second plan. A depositor may effect a transfer of funds or property in at least two ways. The depositor may direct the first plan to transfer the funds or property directly to the second plan without the

depositor receiving anything. Secondly, the depositor may close the first plan, receive the funds or property, and later open a second plan and deposit the funds or property into the new plan. Most depositors transfer money or property directly from one plan to another because no tax is assessed on such a transfer. If the depositor follows the second course and collapses the first plan, then tax will be withheld. One consultant told us that 99.9% of people transferring from one RRSP to another will do so directly from one trustee to another.

[24] In our view, the new exemption should extend to direct payments or direct transfers of funds or property from one registered future income plan to another pursuant to s. 146 of the *Income Tax Act*. The intention is clearly not to transfer property to the debtor but to continue the retirement saving scheme, albeit with a new depository. The *Income Tax Act* singles out this kind of direct transfer as being tax-free. It is difficult to see how the direct transfer of property or funds between registered plans can result in a dishonest advantage to the debtor, as the property will not be in the debtor's hands.

[25] On the other hand, we do not believe that there should be any extension of the exemption where the depositor withdraws money from a registered plan and holds it with perhaps an intention of depositing the money into a new plan. The difference is that the debtor now has the plan funds or property in his or her possession, and is free to use them for any purpose. If the intention behind our exemption proposal is to protect retirement savings, then that exemption cannot extend to funds or property which the debtor is free to use for any purpose.

C. LIST OF INSTITUTE RECOMMENDATIONS

[26] The following recommendations are the core of the report of the Institute and should form the basis of new legislation in Alberta.

RECOMMENDATION No. 1

RRSPs, DPSPs and RRIFs, and obligations to pay money from such plans, should be completely exempt from all judgment creditors' remedies. The exemption will not extend to non-money claims or judgments based on property rights or on the enforcement of security taken on the future income plans.

RECOMMENDATION No. 2

The terms RRSP, DPSP and RRIF should be defined by reference to their definitions in the *Income Tax Act*.

RECOMMENDATION No. 3

The exemption in Recommendation 1 should cease to exist if the RRSP, DPSP or RRIF ceases to be an RRSP, DPSP or RRIF for the purposes of the *Income Tax Act*.

RECOMMENDATION No. 4

RRSPs, DPSPs and RRIFs should be subject to the same exemption, whether or not the plans are sold by insurance or non-insurance vendors.

RECOMMENDATION No. 5

The new section exempting RRSPs, DPSPs and RRIFs should be part of the *Civil Enforcement Act* and should apply notwithstanding any other Act or law.

RECOMMENDATION No. 6

The new *Civil Enforcement Act* section exempting RRSPs, DPSPs and RRIFs

(a) should exempt an RRSP, DPSP or RRIF, whether or not it contains an undertaking to provide an annuity;

(b) should eliminate specific references to insurance; and

(c) should exempt an RRSP, DPSP or RRIF, whether or not it names a beneficiary.

RECOMMENDATION No. 7

(1) The term RRSP in our proposed exemption should be defined to include locked-in retirement accounts (LIRAs).

(2) The term RRIF in our proposed exemption should be defined to include life income funds (LIFs) and locked-in retirement income funds (LRIFs).

RECOMMENDATION No. 8

(1) The new exemption provision should come into force upon Royal assent.

(2) The new exemption provision should not apply to writ proceedings commenced against RRSPs, DPSPs and RRIFs before the date of Royal assent.

RECOMMENDATION No. 9

The new exemption provision should extend to direct payments or direct transfers of funds or property from one future income plan to another pursuant to s. 146 of the *Income Tax Act*.

D. QUESTION FROM SENATE COMMITTEE

[27] When Denis Robert approached the Alberta Law Reform Institute to make a presentation to the Senate Standing Committee on Banking, Trade and Commerce, he asked the Institute to explain why there is a distinction between insurance-based RRSPs and non-insurance RRSPs. The question raises two issues: (1) what is the history of the distinction, and (2) what justification remains for the distinction?

[28] We answered the first question in paragraphs 7 and 8 above. As to the second question, the Institute's position is that there is no justification for insurance and non-insurance RRSPs, DPSPs and RRIFs being treated differently in exemptions law. In our view, both types of plan should be completely exempt from all creditors' remedies. Our reasoning is set out in paragraphs 10 to 18 above.

E. COMPARISON OF REFORM PROPOSALS

[29] In this section, we summarize the three principal alternative reform projects[27]: the Uniform Law Conference of Canada *Consultation Report* and *Uniform Bill*[28], the *Registered Retirement Plans Exemption Act*,[29] and the *Final Report* of the Personal Insolvency Task Force.[30] Where the Institute differs from the conclusions of these projects, we explain why. The elements of the Institute's report and the other three projects are set out in a table at the end of this section.

1. Uniform Law Conference of Canada (ULCC)

[30] In 1998 and 1999, the Uniform Law Conference of Canada (ULCC) approved its *Consultation Report* and *Uniform Bill* which sought to correct what the Conference saw as an unfairness in the exposure of RRSPs to enforcement and garnishment.[31] The principal recommendations in the *ULCC Consultation Report* can be summarized as follows:

(1) All rights, property and interest of a depositor in RRSPs, DPSPs and RRIFs should be exempt from any enforcement process. The effect of this proposal is that such assets would not be available to creditors enforcing their judgments or to trustees in bankruptcy.

(2) The exempt status of these plans should continue only so long as they retain their status as RRSPs, DPSPs and RRIFs under the *Income Tax Act*.

(3) Payments[32] out of such plans to a depositor or the legal representative of a depositor should be subject to exemptions like

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[27] We do not include a recent report on Saskatchewan judgment enforcement law which makes suggestions on future income plans which, with some variations, are similar to the recommendations of the Institute. See Tamara M. Buckwold & Ronald C.C. Cuming, *Interim Report on Modernization of Saskatchewan Money Judgment Enforcement Law* (Regina, Saskatchewan: Queen's Printer, November, 2001).

[28] *Supra* note 23.

[29] *Supra* note 2.

[30] *Task Force Report*, *supra* note 18.

[31] *ULCC Consultation Report*, *supra* note 23; *ULCC Uniform Bill*, *supra* note 23.

[32] The use of the word payment in the *ULCC Consultation Report* and the *ULCC Uniform Bill* creates confusion. What is probably intended is money payable, not money paid.

> those which apply to wages and salary payments, but any amounts over the exemptions should be subject to garnishment. "This is viewed as consistent with the overall policy goal of ensuring adequate retirement funds for a plan holder but not protecting funds from legitimate creditors with respect to the portion of those funds that are in excess of this policy goal."[31]

The *ULCC Consultation Report* was the subject of extensive consultation, the results of which were divided but on balance favoured the proposals.

2. Comment on *ULCC Consultation Report* and *ULCC Draft Bill*

[31] The Institute agrees with the ULCC proposal to exempt totally the corpus of future income plans from enforcement. We have examined carefully the ULCC partial exemption of obligations to pay from such plans but are unable to accept this part of the *ULCC Uniform Bill*. We earlier argued that money obligations from future income plans are usually attached during retirement years when people are in a poor position to earn more money by working overtime, working a second job or finding a better job. Retirement is when the income is needed and cannot be replaced or supplemented. Any enforcement process that renders retirees destitute simply ensures that they will become the responsibility of the state. We also noted that the amount of income a retired person can take from the fund is limited indirectly by the maximum annual contribution allowed under the *Income Tax Act* to RRSPs. Money payable from pensions and insurance RRSPs is usually totally exempt.

[32] The ULCC proposal incorporates the wage and salary exemption scheme, which is going to need considerable tailoring to deal with irregular payments from these plans. For example, if a depositor asks for an RRSP to be collapsed and the entire balance paid out, would the depositor be entitled to only one monthly exemption? The debtor who can create a system of regular payments just below the monthly exemption will be much more favourably treated. Any partial exemption scheme will need to take into account the diversity of payments which can be made out of a retirement savings plan as well as the greater difficulty for retirees to earn

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[31] *ULCC Uniform Bill*, *supra* note 23 at 171.

extra income. The "keep it simple" principle supports a total exemption from garnishment.

3. The *Registered Retirement Plans Exemption Act*

[33] The *Registered Retirement Plans Exemption Act*[34] is substantially the same as the *ULCC Uniform Bill* and does not need separate comment. One significant difference is that the exemption of RRSPs, DPSPs and RRIFs in s. 3 of the Act, unlike the *ULCC Uniform Bill*, does not apply with respect to the enforcement of a maintenance order.[35]

4. Personal Insolvency Task Force *Final Report*

[34] This committee is well aware of the *Task Force Report*[36] which proposes that people in bankruptcy should be able to claim an exemption of RRSPs[37] surrounded by stringent anti-abuse safeguards not in the ULCC proposal. The principal elements of the *Task Force Report* can be summarized as follows:[38]

> **Dollar Cap** – The corpus of the RRSP will be exempt in bankruptcy up to a maximum dollar cap. The cap will be "equal to the maximum RRSP contribution limit in the year of bankruptcy multiplied by the number of years that the bankrupt's age exceeds 21, to a limit of age 65." The *PITF Report* calculates the cap for a forty-one year old bankrupt as $290,000. A sixty-one year old bankrupt will cap at $580,000. These figures seem large, but are likely smaller than the value of many long-term employees' pensions. There is no cap on exempt pensions. However, a cap on exempt RRSPs is necessary because of possible over-contribution, or because "some RRSPs may grow extremely large as a result of shrewd or speculative investments in a self-directed RRSP."

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[34] *Supra* note 2.

[35] The *Registered Retirement Plans Exemption Act*, *supra* note 2, s. 3(3). A similar result follows under s. 93(c) of the Alberta *Civil Enforcement Act*, *supra* note 24.

[36] *Task Force Report*, *supra* note 18 at 17-24.

[37] The *Task Force Report* does not mention DPSPs or RRIFs.

[38] The summary is drawn from Dunlop, "Should Creditors Have Access to Future Income Savings Plans?", *supra* note 2 at 298-299 [titles added; footnotes omitted].

Locking in – "An RRSP exemption will be available to bankrupts only if they convert the RRSP, shortly following the date of bankruptcy, into a locked-in RRSP or annuity that will be accessible only after their retirement." The locked-in RRSP would be similar to the locked-in retirement account (LIRA) into which employees with pensions pay their pension balances upon pre-retirement termination of their employment. The argument underlying the locked-in requirement is that an RRSP exemption is justified only if the RRSP is truly intended for retirement purposes. "Without the conversion to locked-in status, the exemption might merely assist the debtor to preserve tax-deferred savings until shortly after the bankruptcy discharge." Such a practice would undermine creditor confidence in the system.

Clawback – All RRSP contributions (including contributions to a spousal RRSP) made by the debtor within three years of the date of the initial bankruptcy event will accrue to the trustee as property divisible among creditors. "This will be an irrebuttable vesting; that is, it will not be dependent upon any fraud test or judicial determination." Provincial fraudulent conveyance legislation will continue to apply to contributions made after the three year period. The goal of the three-year clawback is to distinguish between long term savings for retirement, and payments made on the eve of bankruptcy which might have been used to pay debts. The test must be irrebuttable because fraudulent conveyance litigation is expensive and risky. Again, the goal is creditor confidence.

Dollar limits to exemption of money payable – Proceeds from the locked-in RRSP will be treated as income available to the trustee, subject to the surplus income standards applied in bankruptcy. In other words, such income, like wages and salary, will be partly exempt, the balance being property divisible among the creditors.

5. Comment on the Personal Insolvency Task Force Proposals on Future Income Plans

a. Dollar Cap

[35] We have concluded that the proposed exemption of future income plans should not be limited by a dollar cap. Our basic policy is that tax-protected vehicles for retirement saving including pensions and RRSPs should be exempt. Pensions and insurance RRSPs are exempt now without any dollar limit. A future income plan must contain substantial funds or property to create even a modest income stream during retirement. Such funds and property need to be exempt from creditors' remedies.

[36] The ULCC opposes a dollar cap, partly because it creates a danger of differing rules across the country.[39] The ULCC argues that pension exemptions have no dollar limit, and RRSP exemptions should be the same. The ULCC also says that the income tax maximum annual contribution limit to RRSPs, DPSPs and RRIFs works as a de facto cap on the total amount of funds or property which can be placed in an RRSP or similar plan. The danger of abuse of the RRSP exemption can be lessened by, for example, restricting the exemption to RRSPs which retain that status under the *Income Tax Act*.

[37] We agree with the ULCC that the maximum annual contribution limit to a future income plan operates as an effective ceiling on the value of such a plan, and we know that many tax filers contribute far less than the maximum limit permits.[40] We doubt that overcontribution as a debt avoidance device is likely to occur as it results in heavy and continuing tax penalties. It is prohibitively expensive. To further deter abuse, we urge that the proposed exemption be restricted to plans which retain their status under the *Income Tax Act*.

b. Locking-in

[38] The Institute considered restricting our proposed exemption to locked-in plans but decided not to adopt this severe limit to the proposal. RRSPs are intended, among other things, to provide a source of retirement income, whether the plan is locked in or not. At bottom, the Task Force idea assumes that only pension-like instruments deserve to be exempt. One may take a broader view and permit exemptions of unlocked RRSPs, even though saving for retirement is not the only use of such plans. The *Income Tax Act* does not limit the RRSP program to locked-in plans. Should judgment enforcement law add such a limitation?

[39] The *ULCC Consultation Report* rejected the idea of limiting their exemption to locked-in plans.[41] One reason is that the ULCC proposed that funds held in RRSPs and DPSPs would retain their exempt status only so long as they retain

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[39] *ULCC Consultation Report*, *supra* note 23 at 256-261, 263-264; *ULCC Uniform Bill*, *supra* note 23 at 168-169.

[40] Statistics Canada, *Retirement Savings Through RPPs and RRSPs 1999* (Ottawa: Statistics Canada, 2001) at 32-34.

[41] *ULCC Consultation Report*, *supra* note 23 at 259, 264-267.

their status as RRSPs and DPSPs under the *Income Tax Act*. The ULCC thought that a locking-in limitation had serious flaws which made it practically undesirable and unworkable. The full discussion by the ULCC is lengthy, but the basic thrust is that locking-in would make RRSPs and DPSPs less desirable in the market, might affect adversely credit granting, and would be an administrative quagmire. Locking-in makes no appearance in the *ULCC Uniform Bill* or in the Saskatchewan *Registered Retirement Plans Exemption Act*.[42]

[40] The market does not currently offer locked-in RRSPs, although it might do so if consumers could see clear advantages to purchasing such plans. In any event, all future income plans are de facto locked in for two reasons: (1) funds and property withdrawn from a plan will be taxable, and (2) our proposed exemption applies to property in a plan, and does not apply to property once withdrawn. This double hit, plus the desire to continue retirement savings, will give depositors a strong incentive to leave future income plans alone.

[41] Nor are we sure that a locked-in regime can work for RRSPs. The pension locking-in system depends, among other things, on the highly regulated and heavily administered nature of pensions. The pension administrators have no mandate to review what RRSP depositories do. Much of the complex legislation governing locking-in of pensions is driven by elements of the tax law and by the group character of pensions in which preservation of the pension fund is necessary to pay pensions to retirees and to cover administrative costs, as well as to ensure that future pension commitments are honoured. An RRSP is an individual fund governed by different rules. The pension system would not be suitable for RRSPs. If we were to create a new system of locking-in rules applicable to RRSPs, we would be inventing brand-new legislation which would be a recipe for litigation, and which would be onerous and difficult to operate. It is unlikely that most creditors would want to use repeated debtor questionnaires or examinations in aid to check on the present status of an RRSP.

[42] Ultimately, we see the goals of pensions and future income plans, whether locked in or not, as the same. They are intended and largely used for retirement saving. They all fall within our desired policy which is to protect such retirement

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[42] *Supra* note 2.

nest-eggs from enforcement proceedings by creditors. We conclude that any exemption of future income plans should not be restricted to locked-in plans.

c. Clawback

[43] The *Task Force Report* has attached another restriction to its proposed RRSP exemption which is, to our knowledge, unique in the reform literature. It is a right to claw back contributions made by the depositor to the RRSP within three years of the bankruptcy. We do not agree. Pensions and insurance RRSP exemptions are not subject to a clawback for recent contributions, nor should they be. If the goal is to protect retirement savings and if the contributions to the RRSP fit within the income tax annual contribution limit, they should be exempt.

[44] The Task Force proposal would no doubt enable trustees to take automatically and more cheaply contributions made within the three years preceding the bankruptcy. In our view, however, the requirements of fraudulent conveyance and preference statutes exist for a reason: to effect a fair balance between debtor, creditor and transferee. The appropriate balance should not be abandoned in order to make things easier for trustees and creditors. We do not see why all contributions to an RRSP made within three years of the creditor's attempt to seize the plan were necessarily made at a time of impending insolvency. Many North American investors have recently experienced quick changes in market prices of their property. A three year cut-off period may be too generous for some and unjustly harsh for others. It may be that the fraudulent conveyance and preference legislation is in need of reform, but quick fixes like the proposed three year irrebuttable clawback seem too short a way with the problem. A further difficulty is to apply the clawback idea to a provincial judgment enforcement system.

d. Dollar Limits to Exemption of Money Payable

[45] The Institute earlier rejected the ULCC proposal for a dollar limit on money payable from RRSPs, DPSPs and RRIFs. For the same reasons, we would reject this aspect of the *Task Force Report*.

ABOUT THE INSTITUTE

The Alberta Law Reform Institute was established on January 1, 1968, by the Government of Alberta, the University of Alberta and the Law Society of Alberta for the purposes, among others, of conducting legal research and recommending reforms in the law. Funding of the Institute's operations is provided by the Government of Alberta, the University of Alberta, and the Alberta Law Foundation.

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APPENDIX E
COMPARATIVE TABLE OF SIGNIFICANT LAW REFORM PROPOSALS

[This chart is an updated version of the chart which was included in the Senate Submission in Appendix D above. It includes the *Senate Committee Report*.]

Issue	ALRI	Task Force	Senate Committee	ULCC	Saskatchewan Act
Need for some exemption of RRSPs, DPSPs and RRIFs[50]	Yes	Yes as to RRSPs	Yes as to RRSPs	Yes	Yes
Should exemption from execution[51] be total?	Yes [52]	No	No	Yes	Yes
Should exemption apply to all judgment creditors' remedies?	Yes [53]	Not applicable	Not applicable	Likely yes[54]	Likely yes[55]

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[50] As defined in the *Income Tax Act*, *supra* note 21.

[51] The Alberta *Civil Enforcement Act* uses "enforcement." In the context of the *Bankruptcy and Insolvency Act*, we refer to property available to the trustee and divisible among the creditors.

[52] The exemption will not extend to non-money claims or judgments based on property rights or on the enforcement of security taken on the future income plans.

[53] But see *supra* note 30.

[54] It is unclear whether the exemption extends to equitable execution. "Enforcement process" is defined in s. 2 of the *ULCC Uniform Bill*, *supra* note 25, to mean "attachment, garnishment, execution, seizure or other legal process for the enforcement of a debt." It is a question whether equitable execution is a "legal process."

[55] It is unclear whether the exemption extends to equitable execution. "Enforcement process" is defined in s. 2 of the *Registered Retirement Plans Exemption Act*, *supra* note 2, to mean "attachment, garnishment, execution, seizure or other legal process for the enforcement of a debt." It is a question whether equitable execution is a "legal process."

Issue	ALRI	Task Force	Senate Committee	ULCC	Saskatchewan Act
Should money payable from RRSPs, DPSPs, and RRIFs be exempt?	Total exemption[56]	Partial exemption	Not discussed	Partial exemption	Partial exemption
Should exemption apply to paid or withdrawn funds or assets?	No except for direct transfer[57] to another RRSP, DPSP or RRIF	Not discussed	Not discussed	No except for transfer[58] to another RRSP, DPSP or RRIF	No except for transfer[59] to another RRSP, DPSP or RRIF
Exemption should extend to LIRAs, LIFs, and LRIFs	Yes	Not discussed	Not discussed	Not discussed	Maybe[60]
Restrict exemption to locked-in plans?	No	Yes	Yes	No	No

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[56] The exemption will not extend to non-money claims or judgments based on property rights or on the enforcement of security taken on the future income plans.

[57] That is, a payment or transfer pursuant to s. 146 of the *Income Tax Act*, *supra* note 21.

[58] S. 4(2) of the *ULCC Uniform Bill*, *supra* note 25, is probably restricted to payments or transfers pursuant to s. 146 of the *Income Tax Act*.

[59] S. 4(2) of the *Registered Retirement Plans Exemption Act*, *supra* note 2, is probably restricted to payments or transfers pursuant to s. 146 of the *Income Tax Act*.

[60] Ss 3 and 4 (but not 5) of the *Registered Retirement Plans Exemption Act*, *supra* note 2, apply "notwithstanding any other Act or law." The result may be that the Act overrides exemption provisions in Saskatchewan pension statutes.

Issue	ALRI	Task Force	Senate Committee	ULCC	Saskatchewan Act
Dollar cap on exemption?	No	Yes	Yes	No (execution) Yes (garnishment)	No (execution) Yes (garnishment)
Clawback of contributions within time period?	No	Yes (3 years)	Yes (1 year)	No	No
New exemption overrides *Insurance Act* exemption as to RRSPs, DPSPs, and RRIFs?	Yes	Yes	Impliedly yes	Likely yes	Likely yes
Delay the coming into force of exemption?	No. In force on Royal assent[61]	Yes. 2 or 3 year period before coming into force	Not discussed	One year delay but not clear[62]	Nine months[63]

[61] But the proposed exemption will not apply to writ proceedings commenced against RRSPs, DPSPs and RRIFs before the date of Royal assent.

[62] S. 6 of the *ULCC Uniform Bill*, *supra* note 25, provides that the Act comes into force on proclamation, but the comment suggests that a delay of one year between passage and proclamation would be desirable.

[63] S. 6 of the *Registered Retirement Plans Exemption Act*, *supra* note 2, said that it would come into effect on proclamation. The Act was passed on May 30, 2002, and proclaimed in force on March 4, 2003.

ISSN 0317-1604
ISBN 1-896078-27-3